83-1255

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No. ____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

Stephen J. Hacker, Petitioner

vs.

The Fifth Third Bank, Respondent

**On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit**

Petition for Certiorari

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QUESTIONS PRESENTED FOR REVIEW[1]/

Did the District Court violate Petitioner's right to due process of law under the Fifth Amendment to the United States Constitution by appointing a receiver for personalty with inadequate notice and without a meaningful hearing?

Did the District Court err to Petitioner's prejudice by appointing a receiver for personalty with inadequate notice and without a meaningful hearing, where the District Court did not make the requisite finding under Ohio law that Respondent would suffer irreparable injury if there was a short delay for a meaningful hearing?

1/The parties to the proceedings below were The Fifth Third Bank, Plaintiff-Appellee, and Stephen J. Hacker and SJH Enterprises Inc., Defendants-Appellants.

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio was announced from the bench and is appended to this Petition in the Appendix. (App. 77).[2/] The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is appended to this Petition in the Appendix. (App. 1-11).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was made and entered on November 29, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[2/] All references to the Appendix are to the page of the Appendix on which the reference appears.

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULE OF CIVIL PROCEDURE

U.S. CONST. AMEND. V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeapardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. XIV. SECTION 1. All persons born or naturalized in the

United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1254(1). (1) Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

. . .

28 U.S.C. § 1332(a). (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between --

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state are additional parties; and

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

42 U.S.C. § 1983. Every person who, under color of any statute, ordinance, regulation, custom, or

usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

OHIO REV. CODE § 2503.20

This statute is reproduced in the Appendix. (App. 115)

OHIO REV. CODE § 2715.04.

This statute is reproduced in the

Appendix. (App. 118)

OHIO REV. CODE § 2715.041.

This statute is reproduced in the Appendix. (App. 120)

OHIO REV. CODE § 2715.042.

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OHIO REV. CODE § 2715.043.

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OHIO REV. CODE § 2715.045(A) and (B).

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OHIO REV. CODE CHAPTER 2735.

This statute is reproduced in the Appendix. (App. 146)

OHIO REV. CODE § 2737.04.

This statute is reproduced in the Appendix. (App. 152)

OHIO REV. CODE § 2737.05.

This statute is reproduced in the

Appendix. (App. 154)

OHIO REV. CODE § 2737.06. This statute is reproduced in the Appendix. (App. 161).

OHIO REV. CODE § 2737.07. This statute is reproduced in the Appendix. (App. 164)

OHIO REV. CODE §2737.19. This statute is reproduced in the Appendix. (App. 166).

FEDERAL RULE OF CIVIL PROCEDURE 64. At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the

remedy is sought subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however, designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

STATEMENT OF THE CASE

On September 21, 1983, Plaintiff

Fifth Third Bank ("the Bank"), an Ohio bank, filed a Complaint for a money judgment only on a Promissory Note against Stephen J. Hacker, a resident of Winter Park, Florida, and for a money judgment only against SJH Enterprises, Inc. ("SJH"), an Ohio corporation, on a Guaranty of said Note, in the United States District Court for the Southern District of Ohio, Western Division. (App. 94). Jurisdiction was premised on 28 U.S.C. § 1332. With the Complaint, the Bank filed a Motion for Appointment of Receiver, supported by an Affidavit of a Bank officer. (App. 99) The District Court then set the Bank's Motion for Hearing the following day at 2:30 p.m., but Defendants' counsel, who was known to the Bank's counsel, was not notified of the filing of the Complaint, the Motion or the

hearing until 9:00 a.m. the next morning. (App. 111).

Defendants' counsel immediately obtained a copy of the pleadings from the Clerk and, subsequently, copies were delivered by the Bank's counsel. Because Mr. Hacker was not in his regular place of business in Winter Park, Florida, but was in Houston, Texas, on business, his counsel was unable to reach him to advise him of the Complaint and Motion until 11:40 a.m. on September 22, 1983, approximately three hours before the hearing. (App. 111).

In its Motion, the Bank claimed a security interest in thirty-four horses, ten horse syndications and products and proceeds thereof according to a certain Security Agreement and purported attachments thereto appended to its Motion.

Because Mr. Hacker disputed whether certain descriptions of collateral were attached to the Security Agreement when he signed it, whether the Security Agreement applied to certain of the alleged collateral and the products and proceeds thereof, and the conclusory allegations of the Bank officer's Affidavit, it was immediately apparent that Mr. Hacker would have to be present in court to testify in opposition to the Bank's Motion. His counsel filed a Motion for Continuance, advising the Court that neither counsel nor Hacker had been advised of the Complaint, Motion or hearing until that morning, that Mr. Hacker was in Houston, Texas and could not appear at the 2:30 p.m. hearing to defend his interests, and there were substantial defenses to the Bank's Motion which required Mr.

Hacker's presence to present. (App. 108)[3/]

At the hearing, the District Court summarily denied Defendant's Motion for a Continuance and stated it intended to appoint a receiver without hearing evidence because the collateral "might be in some danger." (App. 27, 29, 39) Upon Defendants' counsel's objection to such a proceeding, the Court permitted Plaintiff's counsel to call the Bank officer to the stand and, over Defendants' objection, give conclusory, hearsay testimony which purported to support but in significant aspects contradicted the Bank's Motion and his Affidavit. (App. 41-59) During cross-examination of the Bank officer by Defendants' counsel, the Court sustained the Bank's

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[3/]Houston is about a half day plane trip from Cincinnati.

objection to cross-examination seeking to impeach the foundation for his testimony in chief, thereby making the Bank's evidence unrebuttable without Mr. Hacker present to testify. (App. 74) The Court then appointed a receiver for all horses and products and proceeds thereof claimed by the Bank. (App. 76-78; 12)

The stated grounds for the appointment of the receiver were that the District Court preferred to "guess" in favor of the Bank, because if the Court guessed wrong, it might destroy the collateral security of the Bank. (App. 29) The Court disregarded any possible harm to Mr. Hacker from the improvident appointment of a receiver. (App. 31-33; 80-81) The District Court ruled that the identification and application of Ohio law was not "too significant"

because the District Court had general equity power to appoint a receiver (App. 33) The Court of Appeals affirmed on the grounds that the District Court had not abused its discretion in appointing the receiver. (App. 6) Neither the District Court nor the Court of Appeals made the requisite finding under Ohio law that the Bank would suffer irreparable injury if there was a short delay to give Mr. Hacker adequate notice and a meaningful hearing.

Subsequent to the appointment of the receiver by the District Court, Defendants' filed Motions For Summary Judgment and to Dismiss on the grounds that there was not complete diversity of citizenship and the Court lacked personal jurisdiction over Mr. Hacker. The District Court granted the Motion to Dismiss for Lack of Subject Matter

Jurisdiction, but granted the Bank five days to dismiss Defendant SJH Enterprises and thus preserve diversity. In accordance with the District Court's ruling SJH Enterprises was dismissed from this action. Remaining motions, including Mr. Hacker's Motion to Set Aside the Receivership, are submitted.

ARGUMENT

1. Summary.

The decision below should be reviewed to determine the extent to which Fifth Amendment due process criteria are applicable to a pre-judgment seizure of personalty in a diversity case and to consider whether federal courts in diversity cases are bound to follow state substantive law effectuating due process criteria and

balancing the interests of debtors and creditors. The District Court appointed a receiver, with inadequate notice and without a meaningful hearing, without the requisite finding under Ohio law that there would be irreparable injury to the Bank if there was a delay for notice and hearing. Such appointment was a violation of due process rights articulated by this Court in Fuentes vs. Shevin, 407 U.S. 67, rehearing denied, 409 U.S. 902 (1972) and Lugar vs. Edmondson Oil Co., 457 U.S. 922 (1982), and places the District Court and Court of Appeals in implied conflict with the Ohio Supreme Court's decision in Peebles vs. Clement, 63 Ohio St.2d 314, 308 N.E.2d. 689 (1980) and in direct conflict with Ohio's statutes for pre-judgment seizure of personalty enacted thereafter. Ohio

Revs. Code § 2715.045 (B) (Page Supp. 1983); Ohio Revs. Code §2737.19 (Page Supp. 1983); See also Cleveland Railway Co. vs. Jewett, 37 Ohio St. 649 (1882). This Court should grant review to determine whether appointment of a receiver in a diversity case is governed by federal constitutional and state substantive law, or whether such appointment is within the unrestrained discretion of the District Court.

2. Where There Is State Action, There Is A Fourteenth Amendment Due Process Right To Notice And A Meaningful Hearing Before A Pre-Judgment Seizure Of Personalty.

In six principal cases, this Court has considered the applicability of Fourteenth Amendment due process

criteria to pre-judgment seizures of personalty pursuant to particular state statutes. Although three of these cases, Fuentes vs. Shevin, 407 U.S. 67 (1972), Flagg Brothers, Inc. vs. Brooks, 436 U.S. 149 (1978), and Lugar vs. Edmondson Oil Co., 457 U.S. 922 (1982), arose as federal question actions pursuant to 42 U.S.C. § 1983, none of the principal cases arose from the alleged failure of a federal court in a diversity case to apply Fifth or Fourteenth Amendment due process criteria or the failure of a federal court to follow state substantive law effectuating due process criteria. Therefore the questions raised by the instant case in this Court appear to be unique.

In Sniadach vs. Family Finance Corp., 395 U.S. 337 (1969), on

certiorari from the Supreme Court of Wisconsin, this Court held Wisconsin's garnishment statute violated the due process clause of the Fourteenth Amendment because it permitted pre-judgment seizure of a person's wages without notice or judicial review. Writing for the majority, Justice Douglas emphasized that such a pre-judgment garnishment "may impose tremendous hardship on wage earners with families to support." 395 U.S. 337, 340. Justice Harlan wrote a concurring opinion, and Justice Black dissented on the grounds the statute gave the petitioner adequate notice and hearing, and that the Fourteenth Amendment did not grant this Court the right to strike down state statutes with which a majority disagreed for policy reasons.

In Fuentes vs. Shevin, 407 U.S. 67 (1972), on appeals from decisions of three judge panels in actions pursuant to 42 U.S.C. § 1983, this Court considered certain Florida and Pennsylvania pre-judgment attachment statutes, which in substance provided for seizure of personalty on the ex parte application of a creditor without notice and hearing to the debtor. Although the Florida statute in question provided for a hearing on the merits of the conflicting claims to the property after seizure, and the Pennsylvania statute did not, the Court held both statutes violated due process under the Fourteenth Amendment because persons whose property was to be seized were entitled to be notified and granted a pre-seizure hearing at a meaningful time and in a meaningful

manner. 407 U.S. 67, 80-82. Speaking for a majority of four justices, Justice Stewart applied traditional due process concepts to pre-judgment seizures of personality in the debtor-creditor context in bold and broad language. See 407 U.S. 67, 80-82. Rather than reading Sniadach as limited to "necessities" of life such as wages, the majority read Sniadach as being in the mainstream of due process cases. 407 U.S. 67, 88-90. If the Fuentes requirement for a pre-seizure hearing at a meaningful time and in a meaningful manner is applied to the instant case, the Petitioner's due process rights were violated by a drumhead hearing without opportunity for Mr. Hacker to appear in person to testify on his own behalf.

In a dissenting opinion in which

the Chief Justice and Justice Blackmun joined, Justice White reasoned that in the debtor-creditor context, where there was a probable default, state laws providing for immobilizing disputed property were a reasonable balance of the interests of debtor and creditor until the underlying dispute was resolved.

Thereafter, in Mitchell vs. W.T. Grant Co., 416 U.S. 600 (1974), on certiorari from the Supreme Court of Louisiana, this Court considered a Fourteenth Amendment due process challenge to a Louisiana statute, which in substance provided for pre-judgment sequestration of personalty on the affidavit of a lien holder and an order of a judge. Writing for a majority of five, Justice White noted that, under Louisiana law, transfer of personalty

by a debtor would destroy the creditor's lien. The Court held that the statute did not violate due process because there was judicial review of the creditor's affidavit and because there was an immediate right to a post-seizure hearing by the debtor. The majority construed Sniadach and Fuentes as holding only that a hearing must be had before a person is finally deprived of personalty. 416 U.S. 600, 611. In a dissent in which Justices Douglas and Marshall joined, Justice Stewart stated that the statutes in question were remarkably similar to those held unconstitutional in Fuentes and stated that they suffered from the same constitutional defect. Justice Brennan was in agreement that Fuentes required reversal of the judgment of the Supreme Court of Louisiana. 416

U.S. 600, 636. In a concurring opinion, Justice Powell stated that insofar as Fuentes required a hearing before a temporary seizure of personalty, it was overruled. Justice Powell reasoned that because both debtor and creditor had an interest in the personalty in question, the Louisiana statute was a reasonable balance of those interests.

Then, in North Georgia Finishing vs. Di-Chem, Inc., 419 U.S. 601 (1975), on certiorari from the Supreme Court of Georgia, this Court considered a Georgia statute which in substance provided for issuance of a writ of attachment on a conclusory affidavit of the plaintiff or his attorney before some officer or clerk of court. Writing again for a majority of five, Justice White held the Georgia statute

suffered the same constitutional infirmities as the statute considered in Fuentes, because it permitted a secured creditor to repossess personalty without prior notice or hearing and without prior judicial review. The Court distinguished Mitchell on the grounds the Louisiana statute required that the writ of sequestration could only be issued by a judge.

In concurring opinions, both Justice Stewart and Justice Powell stated the Court had revived Fuentes. Justice Powell, however, doubted whether Fuentes struck the proper balance between debtors and creditors in commercial transactions. 419 U.S. 601, 609-11. In a dissenting opinion in which Justice Rehnquist joined, Justice Blackmun noted the apparent

inconsistency of the Sniadach and Mitchell holdings with Fuentes. Justice Blackmun stated Fuentes was improvidently decided by a 4-3 decision when there were two vacancies on the Court at the time of argument. 419 U.S. 601, 617-18.

In Flagg Brothers, Inc. vs. Brooks, 436 U.S. 149 (1978), on certiorari from the United States Court of Appeals for the Second Circuit, in an action pursuant to 42 U.S.C. § 1983, this Court considered whether a warehouseman's proposed sale of goods pursuant to the New York Uniform Commercial Code was state action under 42 U.S.C. §1983. Writing for the majority, Justice Rehnquist distinguished Di-Chem, Fuentes and Sniadach on the grounds there was "overt official involvement" in the

seizures therein, whereas the New York warehouseman foreclosed his lien by sale without such state involvement. 436 U.S. 149, 157. Commenting on Justice Stevens' dissent, Justice Rehnquist emphasized the absence of a state order of seizure and held the mere enactment of a statute which enabled a warehouseman to convert his lien to title did not preclude a post sale action to challenge the sale. 436 U.S. 149, 162 n. 11. Therefore the Court held the absence of state action barred a claim under 42 U.S.C. §1983.

In a dissent in which Justices White and Marshall joined, Justice Stevens concluded the Court's holding was "fundamentally inconsistent with, if not foreclosed by . . ." the Court's prior holdings in Di-Chem, Fuentes and Sniadach. 436 U.S. 149, 169.

Rejecting the majority's distinction between overt official involvement and private action pursuant to a state statute, Justice Stevens reasoned the question considered should be whether the statute itself must meet due process criteria. 436 U.S. 149, 169.

Most recently, in Lugar vs. Edmondson Oil Co., 457 U.S. 922 (1982), on certiorari from the United States Court of Appeals for the Fourth Circuit, in an action pursuant to 42 U.S.C. § 1983, the Court applied due process and state action criteria from Di-Chem, Mitchell, Fuentes and Sniadach to a Virginia statute which provided for pre-judgment seizure of personalty on an applicant's affidavit without judicial review. Speaking for the Court, Justice White stated that "the Court has consistently held that

constitutional requirements of due process apply to garnishment and pre-judgment attachment procedures whenever officers of the State act jointly with a creditor in securing the property in dispute." 457 U.S. 922, 932-33. Whereas the Chief Justice in his dissent and Justice Powell, in a dissent in which Justices Rehnquist and O'Connor joined, disagreed with the majority's construction of the "color of law" criteria of 42 U.S.C. § 1983 as articulated in the foregoing cases and in Flagg Brothers Inc. vs. Brooks, 436 U.S. 149 (1978), none of the Justices disagreed with Justice White's summary of the applicability of due process criteria to pre-judgment seizures of personalty cited above. Thus it now appears clear that there is a Fourteenth Amendment due process right

to adequate notice and to a meaningful hearing before pre-judgment seizure of property where there is state action. What the Court has not considered is whether there is a Fifth Amendment due process right to adequate notice and a meaningful hearing where the pre-judgment seizure is accomplished through a federal district court in a diversity case when that court does not follow applicable state law but its own version of general equitable principles.

3. Where There Is Federal Action, There is A Fifth Amendment Due Process Right To Adequate Notice And A Meaningful Hearing Before A Pre-Judgment Seizure Of Personalty.

The scope of procedural due process

under the Fifth Amendment can be no less than that under the Fourteenth Amendment. Although the instant case appears to be unique, in analagous cases, this Court has found the scope of due process under Fifth and Fourteenth Amendment to be the same. In the equal protection context, this Court, in Hurd vs. Hodge, 334 U.S. 24, 35-36 (1948), stated:

> We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States.

More recently, in Arnett vs. Kennedy, 416 U.S. 134, rehearing denied, 417 U.S. 977 (1974) (plurality opinion), by implication, this Court applied procedural due process standards under the Fourteenth Amendment to a situation

involving the Fifth Amendment right to due process. Accord Arnett vs. Kennedy, 416 U.S. at 164 (Powell, J., concurring) ("Governmental deprivation of [a Fifth or Fourteenth Amendment] interest must be accompanied by minimum procedural safeguards, including some form of notice and a hearing") (footnote omitted).

Lower federal courts are in accord that the right to procedural due process under the Fifth and Fourteenth Amendment is the same. For example, in Earnest vs. Willingham, 406 F.2d 681, 684 (10th Cir. 1969), the Court concluded:

> [I]t goes without saying that a Federal agency may not, consistently with Fifth Amendment due process, do that which a State is forbidden to do by Fourteenth Amendment due process. (footnote omitted).

Similarly, in Cater Ridge Nursing Home,

Inc. vs. Califano, 447 F. Supp. 1222, 1224 (D. Md. 1978), aff'd, 596 F.2d 608 (4th Cir. 1979), the Court stated:

> Under the Fifth and Fourteenth Amendments, the government cannot deprive an individual of a liberty or property interest without a due process hearing.

See also Coleman vs. Darden, 595 F.2d 533 (10th Cir.), cert. denied, 444 U.S. 927 (1979); Pan Am. World Airways, Inc. vs. U.S. District Court, C.D. Cal., 523 F.2d 1073 (9th Cir. 1975).

Federal courts, in the Fifth Amendment context, have considered this Court's holding that due process requirements of the Fourteenth Amendment apply to garnishment and pre-judgment attachment proceedings when there is state action. See, e.g., Geneva Towers Tenants Organization vs. Federated Mortgage Investors, 504 F.2d 483 (9th Cir. 1974) (discussing

Mitchell); Dennis vs. Blount, 497 F.2d 1305 (9th Cir. 1974); (discussing Sniadach); Tucker vs. Burton, 319 F. Supp. 567 (D.C. D.C. 1970) (discussing Sniadach). Thus, the Fourteenth Amendment due process right, to adequate notice and a meaningful pre-seizure hearing, articulated in Fuentes and Lugar, are applicable to this action.

The notice and hearing requirement of due process cannot be postponed except in extraordinary circumstances, which were not found present in this case. In the Fifth Amendment context, this Court has held that the due process right to notice and hearing can be postponed only in extraordinary situations involving important governmental or general public interest. See Calero-Toledo vs. Pearson Yacht

Leasing, 416 U.S. 663, rehearing denied, 417 U.S. 977 (1974) citing cases. This exception has been applied in situations where immediate seizure is necessary to protect the public from contaminated food, North American Cold Storage Co. vs. Chicago, 211 U.S. 306 (1908); from a bank failure, Coffin Bros. & Co. vs. Bennett, 277 U.S. 29 (1928); from misbranded drugs, Ewing vs. Mytinger & Casselberry, Inc., 339 U.S. 594, rehearing denied, 340 U.S. 857 (1950); to aid in the collection of taxes, Phillips vs. Commissioner, 283 U.S. 589 (1931); to aid in the war effort, United States vs. Pfitsch, 256 U.S. 547 (1921); or to aid in forfeiture proceedings by the Government of Puerto Rico. Calero-Toledo vs. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). This exception, however, has not been

applied to normal debtor-creditor situations. In the instant case, there was no evidence whatsoever that the Bank would suffer irreparable injury if there were a brief delay so Mr. Hacker could fly from Houston to Cincinnati to testify on his own behalf. Furthermore, the District Court and Court of Appeals made no finding that the appointment of a receiver with inadequate notice and without a meaningful hearing was in furtherance of an important governmental interest.

Federal courts apply the same standards for determining whether there was federal action for purposes of the Fifth Amendment as are applied in determining whether there was state action for purposes of the Fourteenth Amendment. Warren vs. Government National Mortgage Association, 611 F.2d

1229 (8th Cir.), cert. denied, 449 U.S. 847 (1980); Geneva Towers Tenants Organization vs. Federated Mortgage Investors, 504 F.2d 483 (9th Cir. 1974).

In the instant action, there can be no dispute that there was federal action. The District Court itself ordered the seizure of the property of Petitioner with inadequate notice and without a meaningful hearing. Therefore Petitioner's rights to procedural due process under the Fifth Amendment were violated.

4. The Ohio Statutory Scheme For Pre-Judgment Attachment Or Possession Of Personal Property Requires Notice And Hearing Unless The Moving Party Will Suffer Irreparable Injury If

The Order Is Delayed To Give Such Notice And Hearing.

In Peebles vs. Clement, 63 Ohio St.2d. 314, 308 N.E.2d 689 (1980), the Ohio Supreme Court considered Ohio's pre-judgment attachment statutes in Ohio Revs. Code Chapter 2715 in the light of Sniadach, Fuentes, Mitchell and Di-Chem. The Court held Ohio's pre-judgment attachment statutes were unconstitutional because they required the clerk of court to issue the order of attachment upon an affidavit of the plaintiff, his agent or an attorney, without any form of judicial review. Thereafter, the Ohio legislature revised Ohio's statutes for pre-judgment attachment and recovery of specific personal property to provide for notice and judicial hearing before the attachment was issued or before an

order of possession was entered. Ohio Revs. Code §§ 2715.04; 2715.041; 2715.043; 2737.04; 2737.05; 2737.07. (Page Supp. 1983).

The Ohio legislature then addressed an issue discussed but not decided by this Court in Sniadach vs. Family Finance Corp., 395 U.S. 337, 339 (1969) and Fuentes vs. Shevin, 407 U.S. 67, 90-91 (1972), and defined the circumstances under which an order of attachment or recovery of specific personal property may be issued without notice and hearing. In identical language in Ohio Revs. Code §§ 2715.045 (Page Supp 1983) and 2737.19 (Page Supp 1983), the legislature in substance provided that such order could only be issued upon a showing that the moving party "will suffer irreparable injury if the order is delayed until the

defendant against whom the motion has been filed has been given the opportunity for a hearing." Irreparable injury is defined in subsection B of each statute as either:

> (1) There is present danger that the property will be immediately disposed of, concealed, or placed beyond the jurisdiction of the court;
>
> (2) The value of the property will be impaired substantially if the issuance of an order (of attachment) (of possession) is delayed.

These statutes are a legislative re-enactment of paragraph 2 of the syllabus of Cleveland Railway Co. vs. Jewett, 37 Ohio St. 649 (1882), where the Ohio Supreme Court stated criteria for appointment of a receiver under the predecessor of Ohio's general receivership statute, Ohio Revs. Code Ch. 2735.

Paragraph 2 of the syllabus[4/]

holds:

> The appointment of a receiver to take from the defendant the possession of his property, cannot be lawfully made without notice, unless the delay required to give such notice will result in irreparable loss.

In the opinion, the Court stated criteria for "irreparable loss" as follows:

> There was no obstacle to giving notice to the company before acting on the appointment of a receiver. No fraud or insolvency was charged against any of the parties; nor that the property of the company was in danger of removal beyond the jurisdiction of the court, or of otherwise being lost. 37 Ohio St. 649, 659.

[4/]Under Ohio law, the syllabus of the case states the holding of the Court. Baltimore & Ohio Railroad Company vs. Baillie, 112 Ohio St. 567, 148 N.E. 233 (1925); Ohio Revs. Code § 2503.20. See also Perkins vs. Benquet Consolidated Mining Co., 342 U.S. 437, rehearing denied, 343 U.S. 917 (1952).

In the instant case, neither the District Court nor the Court of Appeals made the requisite finding under Ohio law that the Bank would suffer irreparable injury if there was a brief delay to give adequate notice and a meaningful hearing to Mr. Hacker.

5. The Courts Below Erred In Failing To Follow Ohio Statutory And Case Law.

In a diversity action, the District Court is bound by the substantive law of the state in which it sits. Erie Railroad vs. Thompkins, 304 U.S. 64 (1938). Federal Rule of Civil Procedure 64 in substance provides that remedies for pre-judgment seizure of property are available under the circumstances and in the manner provided by the law of the state in

which the District Court is held, and existing at the time the remedy is sought. Instead of identifying and applying Ohio law as required by Erie and Rule 64, the District Court said the identification of Ohio law was not "too significant". (App. 33) The Courts below erred to Petitioner's prejudice in failing to follow Ohio statutory and case law.

The instant case is an action for a money judgment only. In such a case, the Ohio courts have consistently held that the plaintiff must follow the attachment statute rather than seek appointment of a receiver. Hoiles vs. Watkins, 117 Ohio St. 165, 157 N.E. 557 (1927); Sweesy vs. Potter Oil Co., Inc. 38 Ohio App. 206, 176 N.E. 124 (Summit County 1931). The stated reason for this requirement is to prevent

plaintiffs in actions at law from avoiding the more stringent provisions of the attachment statute by seeking appointment of a receiver under Ohio's general receivership statute, Ohio Revs. Code Chapter 2735. 38 Ohio App. 206, 209, 176 N.E. 124, 125.

Even if, as the Court of Appeals appeared to find, the Bank could proceed under the general receivership statutes in Ohio Revs. Code Chapter 2735, the Bank was still bound by Ohio case law, which prohibits the appointment of a receiver without notice unless the delay required to give such notice would result in irreparable loss. Cleveland Railway Co. vs. Jewett, 37 Ohio St. 649 (1882). Thus, the "guess" of the District Court that the Bank might be injured if the receiver was not appointed (App. 29)

and the view of the Court of Appeals that the District Court's statements constituted a finding that the Bank would suffer irreparable injury if the receiver were not appointed, (App. 7-8) missed the point of Ohio statutory and case law: a receiver may only be appointed without adequate notice and without a meaningful hearing where there is proof of irreparable injury during the short time required to give the defendant a hearing. By disregarding this criterion, the District Court and the Court of Appeals explicitly substituted the general equity power of federal courts for statutes of the Ohio legislature and the case law of Ohio, which set a more favorable balance for debtors than those Courts were inclined to adopt (App. 5-6, 33).

CONCLUSION

This case raises the unusual question whether a debtor has a Fifth Amendment due process right to adequate notice and a meaningful hearing before pre-judgment seizure of personalty in a diversity case. In addition, this case raises a substantial question whether a federal district court, sitting in a diversity case, may disregard the statutory and case law of the state in which it sits, where that law effectuates decisions of this Court which recognize a due process right to adequate notice and a meaningful hearing before a provisional seizure of personalty. The discretion of federal district judges in diversity cases should not be interpreted so broadly as to override the United States

Constitution or the substantive law of the states in which they sit. It is therefore respectfully requested that this Petition be granted.

FREDERICK J. MCGAVRAN
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(513) 651-6800

83-1255

Supreme Court, U.S.
FILED
JAN 28 1984
ALEXANDER L. STEVAS
CLERK

No. ____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

Stephen J. Hacker, Petitioner

vs.

The Fifth Third Bank, Respondent

**On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit**

Appendix for Petition for Certiorari

FREDERICK J. MCGAVRAN
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No. _____

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(FILED NOVEMBER 29, 1983)

83-3667

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FIFTH THIRD BANK,

Plaintiff-Appellee,

v.

STEPHEN J. HACKER, SJH Enterprises, Inc.

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION Sixth Circuit Rule 24 limits citation to specific situation. Please see Rule 24 before citing in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the court. **This notice is to be prominently displayed if this decision is reproduced.**

/

BEFORE: KEITH and KENNEDY,
Circuit Judges, and Gibson*

PER CURIAM. Defendants-Appellants Stephen Hacker and SJH Enterprises appeal from a district court's order which appointed a receiver to administer and protect certain collateral.

On September 21, 1983, plaintiff Fifth Third Bank filed a complaint against defendant because he was in default under the terms of his secured promissory note executed on February 28, 1983. The complaint also alleged an action against SJH Enterprises as guarantor of the note.

---

*Honorable Floyd R. Gibson, Senior Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

Along with the complaint, the Bank filed a motion to appoint a receiver to protect certain collateral which the bank feared was in jeopardy of dissipation. The defendant was notified of the hearing on the morning it was to be heard. The defendant's attorney made a motion for a continuance because the defendant was in Texas and unable to attend. The trial court denied the motion and the hearing proceeded with defendant's attorney in attendance.

The Senior Vice President of the Bank, George Schaefer, testified at the hearing that the defendant had been in default of the note since May 31, 1983. The outstanding principal balance on the note was $2,345,273. The Bank submitted evidence that twenty-five mares were to serve as collateral for

the note, as were thirteen syndicate shares which represented breeding rights to certain stallions. Mr. Schaefer testified that the Bank was to receive twenty-five certificates of foal registration which represented ownership rights in the collateral. However, the Bank currently possessed only two to three of the original certificates. Without the certificates, the collateral could be sold.

Although the Bank had originally received four or five of the certificates, it had temporarily returned several of these certificates at defendant's request in order to allow defendant to race the horses. After the races were over, however, the defendant failed to return all the certificates despite the Bank's

repeated request for him to do so. The Bank also alleged that through its investigations, it discovered that some of the mares had disappeared; their whereabouts unknown. Also, several of the mares: "Pretty Sunny", "Jaka's Lady" and "Hold Your Piece" had been sold, but defendant rarely remit(ted) the proceeds."

In the case of "Hold Your Peace", the Bank was to receive at least $40,000 from the sale but has yet to receive any of this amount. The district court, in light of the aforementioned evidence, concluded the collateral was being disposed of with only minor payments remitted to the bank, and therefore a receivership was appropriate. We affirm.

The appointment of a receiver is within the sound discretion of the

trial judge. Guy v. Citizens Fidelity Bank and Trust, 429 F.2d 828, 833-34 (6th Cir. 1970).

Defendant's first claim that the trial judge abused his discretion by appointing a receiver without providing adequate notice and opportunity to be heard, is unpersuasive.

The defendant in fact received notice and his attorney was present at the hearing to represent him. Although the Bank's motion was scheduled for hearing only a day after it was filed and defendant was not notified until the morning it was heard, there would appear to be no basis to defendant's claim that the Bank deliberately failed to notify him of the hearing. True, the defendant was not present at the hearing, but he was represented by his attorney who had an opportunity to

present evidence on the defendant's behalf.

Moreover, the trial judge informed the defendant that he would set a subsequent hearing for additional evidence at any time the defendant so requested.

Even if one were to assume that the brevity of notice substantially deprived defendant of notice and opportunity to be heard, courts have held that where there is a showing of irreparable injury, prior notice and a hearing may be postponed. Granader v. Public Bank, 417 F.2d 75 (6th Cir. 1969), cert. denied, 397 U.S. 1065 (1970); Tennessee Public Co. v. Carpenter, 100 F.2d 728 (6th Cir.), cert. denied, 306 U.S. 659 (1938).

The trial judge found that the Bank would incur irreparable injury if the

receiver were not appointed. This finding appears sound. Defendant had been in default of his note and security agreement since May 31, 1983.

The Bank discovered that the "seasons" or breeding rights in the stallions which served as collateral recently had been sold. It was the Bank's understanding that defendant would receive Three Hundred Thousand ($300,000) Dollars for these "seasons" sometime during the month of September.

Also, the Bank had only two to three of the certificates of ownership. Without the certificates the Bank had no way of preventing the sale of the mares. The Bank's officer testified that some of the mares had disappeared, and the Bank did not known their whereabouts, and had not received any of the proceeds. Finally, the Bank

testified that defendant had been uncooperative in his dealings with the Bank and had failed to tender the certificates of ownership despite repeated requests.

This evidence supports the trial judge's finding of irreparable harm.

Defendant's second claim is that plaintiff's complaint is for a money judgment only and therefore pre-judgment attachment is his sole form of relief. This claim is also without merit. The Bank had a properly perfected security interest in the collateral. The appointment of a receiver is permitted where the applicant has a right to, interest in, or lien upon the property in question. Hoiles v. Watson, 117 Ohio St. 165, 157 N.E. 557 (1927). Therefore, it was appropriate to appoint a receiver to

protect the Bank's interest in the collateral which secured the note.

The defendant also takes issues with a statement made by the trial court which allegedly indicated that a "guess work standard" was used to determine whether a receiver should be appointed. The trial judge, in explaining why it was necessary to appoint a receiver stated:

> "So there be no question. I will hear from you in detail, but observe, I can be wrong either way. I can be wrong by appointing a receiver where one isn't necessary, or I can be wrong in not appointing where one is necessary. If I guess wrong in that fashion, I can destroy the collateral security of the lender. It seems to me that if I must make a choice, as to which way to err, I'm better off to err in protecting this collateral, rather than not protect it."

This Court does not object to the trial court's language. Placed in its proper context, it is obvious that the

judge's statement was in reference to the balancing of equities that must take place before a receiver is appointed to administer and protect property. Moreover, the trial court made it clear that at any time the defendant had additional evidence on the appropriateness of a receiver, he would schedule a hearing to consider this evidence. Although the defendant has filed a number of motions in the trial court, he has yet to act on the judge's offer to set a hearing.

Accordingly, the order of the Honorable Carl B. Rubin of the United States District Court for the Southern District of Ohio, Western Division, is affirmed.

(FILED SEPTEMBER 26, 1983)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

FIFTH THIRD BANK,

Plaintiff

v.

STEPHEN J. HACKER, et al.,

Defendants

Case No. C-1-83-1547

(Judge Rubin)

ORDER APPOINTING RECEIVER

This matter came on for hearing on the Motion of Fifth Third Bank for the Appointment of a Receiver on September 22, 1983 at 2:30 P.M. in the United States District Court in Cincinnati, Ohio before Judge Carl Rubin. The Court having reviewed the Motion and hearing the testimony of George A.

Schaefer, Senior Vice President of the Fifth Third Bank, finds that the Motion for Appointment of the Receiver is well taken and does hereby grant same.

It is therefore ORDERED THAT:

Robert O. Edington,
Attorney at Law
1650 Atrium One,
201 East Fourth Street
Cincinnati, Ohio 45202

is appointed Receiver of the property interests of Stephen J. Hacker in certain thoroughbred horses, listed in Exhibits "A" and "B" attached to this Order. The Receiver has the authority to preserve, protect, and collect all the horses, certificates evidencing ownership of the horses or undivided fractional ownership shares in the horses listed in Exhibits "A" and "B" attached to this Order and young of the horses, and the products and proceeds of the horses.

The Receiver is specifically authorized to collect all monies held by any party arising from the sale, racing, sale of breeding seasons or otherwise directly or indirectly related to the horses listed on Exhibits "A" and "B" attached.

It is further ORDERED that Robert O. Edington shall post a bond of $100,000 with this Court.

/S/ Carl B. Rubin
JUDGE CARL B. RUBIN

/S/ LOUISE M. ROSELLE
REISENFELD & ASSOCIATES
By: Louise M. Roselle
Attorney for Plaintiff
Auburn Barrister House
2355 Auburn Avenue
Cincinnati, Ohio 45219
(513) 381-6810

FREDERICK J. McGAVRAN
Attorney for Defendant
2500 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202

EXHIBIT "A"

Steve's Jewel
'81 Joachim/Steve's Jewel Filly
Pretty Sunny
'82 Codex/Pretty Sunny Filly
Jaka's Lady
'82 Diamonds Are Trump/Jaka's Lady Colt
Smile Pretty
Distortion
'81 New Prospect/Smile Pretty Filly
'82 Vagaries/Smile Pretty Filly
Coin Prospector
Born to Reason
Continental Suit
Kissonthewips
Hack's Flash
Vitus Dancer
New Ripple
'81 Distinctive/New Ripple Filly
'82 Diamonds are Trump/New Ripple Colt
March Pane
'82 Riverman/March Pane Colt
Balsane
'82 State Dinner/Balsane Filly
Hemostat
First Sea Lord
'81 Stage Door Johnny/Chimmy Filly
Hill Daisy
Scott's Babe
Fey
Bubbly Beginning
Treasury Dip
Come Up Pence
Zulu Fire
'81 North Sea/Zulu Fire Filly

EXHIBIT "B"

NAME SYNDICATE	NUMBER SHARES	VALUE
DIAMONDS ARE TRUMP	4	$ 76,000.00
HOLD YOUR PEACE	1	$ 55,000.00
VAGARIES	1	$ 16,000.00
RIVERMAN	1	$500,000.00
PLUGGED NICKLE	1	$275,000.00
TRUE COLORS	1	$ 25,000.00
STATE DINNER	1	$200,000.00
CODEX	1	$155,000.00
MUSCOVITE	1	$ 75,000.00
ARGUMENT	1	$150,000.00

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

FIFTH THIRD BANK,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	C-1-83-1547
	:	
STEPHEN J. HACKER, et al.,	:	
	:	
Defendant.	:	

Before:

The Honorable Carl B. Rubin,

Chief Judge

Cincinnati, Ohio

HEARING ON MOTION TO APPOINT RECEIVER
SEPTEMBER 22, 1983
IN CHAMBERS CONFERENCE
SEPTEMBER 23, 1983

- - -

APPEARANCES:
ON BEHALF OF THE PLAINTIFF:
Silvan Reisenfeld, Esq.
Louise Roselle, Esq.
George Schaefer

ON BEHALF OF THE DEFENDANT:
Frederick McGavran, Esq.

Linda M. Kuppin,
Official Court Reporter

** CIMMARON Computer-Aided
Transcription**

THURSDAY AFTERNOON SESSION

SEPTEMBER 22, 1983

P R O C E E D I N G S

BEFORE THE COURT:

THE COURT: This is the matter of Fifth Third Bank versus Stephen Hacker, 83-1547.

It's my understanding that the plaintiff is seeking the appointment of a receiver.

Mr. Reisenfeld, can you tell me something about this case?

MR. REISENFELD: If I may, if it please the court, this action arises out of a promissory note that was executed by the defendant on November first, 1982, and a statement Mr. Hacker executed in favor of the bank, a security agreement, which, in fact, contained a list of thoroughbred horses and various by-products that come from

these horses.

In toto --

THE COURT: Excuse me. That's an odd statement. The ability to sell shares in mating mares?

MR. REISENFELD: Yes, and what is known as seasons. Whenever you have shares of thoroughbreds with syndications involved, there are certain seasons involved.

THE COURT: As I understand it, a share entitles you to nominate a mare, depending on the number of shares. Are these horses all stallions?

MR. REISENFELD: All stallions and mares. We had thirty-five separate mares that were listed on the security agreement, which has caused a great deal of problems and the reason that we are here today, as well, if Your Honor

please.

Throughout the time from November first until the time that his loan became in default, which was in May of 1983, the bank has worked diligently, through Mr. Hacker's counsel, and through its own counsel to try to achieve some sort of a work out of the problem. There is, as you will note in the suit filed in this case, a total due and owing the bank of two million three hundred thousand dollars plus.

The matter has been in default since May, and in June of 1983, again, through the intervention of counsel, Mr. Wachs, who is a member of the law firm representing Mr. Hacker today, a new letter of agreement, a new letter of intent was put into effect, whereby, Mr. Hacker had agreed to, in an orderly fashion, allow the bank to start

selling some of the collateral.

The bank at that time found out that, of those horses listed in the security agreement, a number of them had already been sold in January of 1983.

The security agreement specifically called for a security interest in the proceeds of the collateral as well as the collateral itself.

I want Your Honor to know that there had been a few payments, all interest, from the time of the June 23rd attempted work out until the present time, there was a total of, I believe, about $142,000 paid all to interest to take care of the past due interest.

What facilitated the bringing of the action yesterday and the motion for receivership was primarily a finding by

the bank that the seasons that were involved were, in fact, sold by Mr. Hacker, a short period ago, and it is the understanding of the bank that he is to receive approximately three hundred thousand dollars in cash for those seasons and it is our belief that that money will be due to him sometime during the month of September of 1983.

It is also a problem in that on two specific occasions, Mr. Hacker asked the bank for permission to and for its cooperation in sending certain syndication shares and certain certificates of ownership to two racetracks in the United States. One at Arlington, and one, I believe, at Belmont, for two specific racehorses, the problem being that, unless the racetracks receive these certificates, these horses are not permitted to run

at the tracks.

In good faith, the bank did, in fact, send the certificates to the respective racetracks, and now, once we have reached a position where we have no cooperation whatsoever from Mr. Hacker in trying to achieve the work out that was entered into on June 23, 1983, we find that the racetracks will not send back the certificates, because they are, as they feel, caught in a very awkward position. They are serving two masters as such. Mr. Hacker, who is saying, "Don't return them." At least that's what our understanding is, and the bank saying, "We sent them to you in good faith, now return them."

We believe that, in that respect, a receiver is necessary to at least have a court order and some portfolio, if

you will, to go to these racetracks and collect back the certificates that belong to the bank.

THE COURT: What effect do these certificates have if they remain outstanding?

MR. REISENFELD: Without the certificates the bank has no control of its collateral; without the certificates the bank has no ability to sell any of its collateral.

THE COURT: Okay. These certificates release a right in these horses?

MR. REISENFELD: The certificates is, in fact, very much like a certificates of title to an automobile. It is the certificate of ownership for the particular interest in either the stallion or the mare or thoroughbred or whatever the case may

be.

THE COURT: Mr. Reisenfeld, I have only a very general knowledge. I would not want it thought that I'm that familiar with racetracks, but I'm aware of something called a claiming race. I assume that what you are suggesting is that it would be possible to put these horses into a claiming race and someone else claim them, and, thereby, obtain good title.

MR. REISENFELD: Judge, I would think so. I will be perfectly honest with you. I'm not sure of the answer but I do have a witness present today who is an expert in that area and who is ready, willing and able to testify in regard to those type of questions. I do not profess either to be an expert in this area. But I would suspect you are correct.

THE COURT: The reality at this point is that there is collateral security for this loan and the collateral might be in some danger.

MR. REISENFELD: We think it is in imminent, total danger, yes, your Honor. We would indicate to the court that we know that the general rule, and I'm sure Mr. McGavran is going to argue that the notice issue is a problem. We just filed this yesterday afternoon and, quite frankly, we just gave notice early this morning, first thing this morning to Mr. Wachs that this motion of receivership was filed, but we believe that there is a great amount of authority where the court can appoint a receiver, without the notice requirement, both Sixth Circuit cases, as well as Ohio cases, and we believe, in that accord, that it's important

that we have the protection that we seek in this matter today.

THE COURT: Mr. Reisenfeld, I'm aware of an axiom that I thought that bankers followed. "Never invest in anything that eats." I'm mildly curious, is it customary for banks to lend money on racehorses?

MR. REISENFELD: Again, Your Honor, I have Mr. Schaefer here today who is Senior Vice President of Fifth Third Bank. I think he would be better qualified to answer that.

THE COURT: It really doesn't matter. I was just mildly curious. This isn't what you would ordinarily expect a bank to lend money on.

MR. REISENFELD: Sometimes it's the only thing that is available in collateral and sometimes that's better than nothing, and I suppose that

might have been the case in this situation.

THE COURT: Mr. McGavran, I will hear from you.

MR. McGAVRAN: Your Honor, please, counsel, Your Honor, we were notified, as Mr. Reisenfeld said, of the complaint and the motion and the hearing about nine o'clock this morning. I filed a motion for a continuance, stating --

THE COURT: Which I am denying, Mr. McGavran. So there be no question. I will hear from you in detail, but observe, I can be wrong either way. I can be wrong by appointing a receiver where one isn't necessary, or I can be wrong in not appointing one where one is necessary. If I guess wrong in that fashion, I can destroy the collateral security of the

lender. It seems to me that if I must make a choice, as to which way to err, I'm better off to err in protecting this collateral, rather than not protect it.

While I recognize, this is very short notice, and I'm perfectly willing to set a subsequent hearing, I really have some concern about what has been expressed. Are these facts essentially correct?

MR. McGAVRAN: Let me say several things, if I may, Your Honor. I understand the court has denied my motion. If I may just make one observation, and that is, if the court does appoint a receiver, and it turns out at a subsequent time that the appointment was incorrect, the effect of appointing a receiver on assets of any businessman has tremendous corse-

quences that can go far beyond the scope of the action, and --

THE COURT: For the value of a racehorse as distinguished from physical assets of the company is something entirely different. The value of a racehorse, I would assume, is on its speed, and in the case of the stallions, their bloodlines for purposes of stud. I can't see how either of these things are affected by the appointment of a receiver.

MR. McGAVRAN: I didn't make myself clear. A businessman has a receiver appointed for certain of his assets. I am not familiar with Mr. Hacker's businesses. I don't know what his credit agreements are. I believe that in some credit agreements, it may well be a provision that an appointment of a receiver will be an event of

default under agreements other than those with the Fifth Third Bank.

I am simply suggesting to Your Honor that the consequences of what is done in appointing or not appointing a receiver may be tremendous and be tremendously detrimental to Mr. Hacker and his business. I cannot stand here and point to the chapter and verse of Mr. Hacker's affairs, because I got into this this morning and I don't know. I'm stating that the consequences to my client may be every bit as tremendous as they may be to the Fifth Third Bank.

I also would say to the court that this complaint and this motion and this affidavit didn't tell me what Mr. Reisenfeld just said. That cannot be abstracted from a conclusory allegation in this affidavit or in this motion,

which I do not know, standing before the court, under what section of Ohio law we are proceeding. I don't know from these papers whether we are going under 2735.01, I don't know if this has something to do with fraudulent conveyances under Chapter 1356 and 7 or 1336. I don't know whether we are after a pre-judgment attachment in 2715.

THE COURT: Let's leave it at this, Mr. McGavran. I don't think that's too significant. I think the sole question here is one that's addressed to traditional equity powers. Here is a lender with collateral security that's in danger and there is some basis, from what Mr. Reisenfeld has said, of what has already occurred, that would place this lender collateral in danger. All these things are

somewhat ephemeral. They may occur; they may not occur. But here is a practical situation. Your client, unless you are prepared to rebut this, accepted some money that should have gone to the bank and didn't remit it.

He has sold horses that are listed on this collateral. He has reduced the security, or at least at this particular point, there is an appearance that that's been done. Isn't that where the equity powers of a court are traditionally invoked?

MR. McGAVRAN: Well, Your Honor, the equity power is an extraordinary power.

THE COURT: Equity itself is extraordinary. There's no legal remedy, that's correct.

MR. McGAVRAN: What we have here is by this motion, what should be

an action on a note and an action -- action to foreclose on security has been expanded by the motion into an action to appoint a receiver. That's where we are, and the court asked me, did he sell the horses and not give them the money? I don't have Mr. Hacker here. I can't stand here and for him say whether that happened or it didn't. As best as I know, if horses were sold, the proceeds were expended with the knowledge and the consent of the bank for the preservation of the collateral. I'm in a position of contradicting witnesses without having my client here, and --

THE COURT: This happens with great frequency, when there is extraordinary relief sought, Mr. McGavran. But the relief itself can be destroyed by delay. The only thing --

I liken this to a temporary restraining order. A protection of collateral, simply, everybody stop what you are doing right now. The court will take jurisdiction and now you want a hearing to dissolve the receivership, I'm available, but at this precise moment, it seems to me that, as a matter of caution, for everybody's protection, this collateral ought to be protected. Apparently, the loan is in default. I don't know what the situation will develop on that, but I simply feel that this isn't as though it's a mortgage on a building that isn't going to move. Horses can be moved. Do you know where these horses are located?

MR. McGAVRAN: I know where some of them are located.

THE COURT: Where?

MR. McGAVRAN: They are

located in Florida, I believe one or two are in Chicago and I believe in New York.

THE COURT: Anything further, Mr. McGavran?

MR. McGAVRAN: In summarizing what I believe the evidence would be, there will be a dispute as to what horses were covered by the security agreement.

THE COURT: It could take us months to sort that out, couldn't it?

MR. McGAVRAN: I really can't answer that, Your Honor.

THE COURT: How would you -- forgive me for using that phrase, but it's been my experience that any time something as complicated as involving two million dollars is concerned, it isn't going to be straightforward. It's going to take a long time to sort

things out, and if the allegation is which horses were covered and which were not and when were they covered, that's all the more reason, it seems to me, to make sure we preserve everything so nothing further happens.

MR. McGAVRAN: Secondly, I would say that any disposition of the assets that has happened, has been, I'm repeating myself, was done with the knowledge and consent of the bank. I would pick up on a statement that Mr. Reisenfeld made, the filing of this suit came out of the blue while negotiations with my partner, Jim Wachs, were in progress. It would seem to me that as a result of a phone conversation we had with Mr. Hacker this morning that much of this matter could be taken -- could be disposed of by a negotiation among counsel rather

than by order of the court, and having said that, if the court is going to proceed, I would need, I did not ask Mr. Wachs to come over. He was involved in a meeting all day that had been previously set. If I may have your permission to have perhaps a five minute break, I would like to have him over here, because he's been involved in the negotiations and in lieu --

THE COURT: Mr. McGavran, I'm not willing to prolong this. I do not propose to hear evidence. I propose instead to set this down for a full hearing at a time that is convenient, but, likewise, to appoint a receiver right now, and make sure that this is retained in its present status.

It may well be that you can establish that this has been done wrongfully or maliciously, and your

client may have a substantial damage suit against the Fifth Third Bank for proceeding in this fashion, and for misleading the court and for causing him great damage. You know, that right is always preserved to him. But I'm faced at this point with the opportunity to make a mistake, either way. It seems to me that the remedies that are available are such that if I must make a mistake, I better make a mistake in protecting this collateral rather than to let it alone.

If you wish a time for a hearing, if you want to conduct any discovery in the meantime, I'm sure we can accommodate you.

MR. McGAVRAN: If I heard Your Honor correctly, the court is going to appoint a receiver.

THE COURT: Yes.

MR. McGAVRAN: Without hearing evidence?

THE COURT: That's correct. At this particular point, today, I'm going to appoint a receiver, simply to keep this matter in status quo.

MR. McGAVRAN: May I make two points, Your Honor?

THE COURT: Sure.

MR. McGAVRAN: The first, with respect, I must assert my client's objection to the appointment of a receiver on nothing more than a conclusory affidavit and statement of counsel.

THE COURT: Alright. I will hear the testimony of the gentleman from the Fifth Third Bank and you may interrogate. Mr. Reisenfeld, you may proceed.

MR. REISENFELD: If Your Honor

please, we'll call Mr. George Schaefer.

GEORGE A. SCHAEFER, JR., the witness, having been duly cautioned and sworn, testified under oath as follows:

DIRECT EXAMINATION

By Mr. Reisenfeld:

Q. For the record, Mr. Schaefer, would you tell the court your name and spell your last name, please?

A. George A. Schaefer, Jr., S-c-h-a-e-f-e-r.

MR. McGAVRAN: If Your Honor please, Mr. Reisenfeld earlier said there may be another witness in the courtroom. I would move for a separation of all witnesses.

THE COURT: All persons in this courtroom who will be called upon to testify who are not seated at counsel table are directed to leave the courtroom at this time and remain

outside until summoned. You may proceed.

By Mr. Reisenfeld:

Q. By whom are you employed, Mr. Schaefer?

A. The Fifth Third Bank.

Q. In what capacity are you employed there?

A. I'm Senior Vice President and Loan Officer there.

Q. Are you familiar with Stephen J. Hacker?

A. Yes, I am.

Q. Tell the court how you became familiar with Mr. Hacker.

A. Mr. Hacker has been a client of the bank for approximately ten years and I was the loan officer handling his relationship with our bank.

Q. In November of 1982, was there a note and security agreement executed

by Mr. Hacker in favor of the bank?

A. Yes, there was.

Q. Approximately what was the amount of money of that particular promissory note?

MR. McGAVRAN: I object.

THE COURT: Overruled.

THE WITNESS: The note was approximately two million three hundred and forty-five thousand odd, I believe.

Q. In addition to the note, there was a security agreement?

A. Yes, there was.

Q. What was the collateral for the security agreement?

MR. McGAVRAN: I object.

THE COURT: Overruled.

THE WITNESS: The collateral was certain stallions syndicate shares and certain mares, certain race horses.

Q. Mr. Schaefer, did you have an

opportunity to discuss this particular loan with Mr. Hacker on a number of occasions?

A. Yes, I did.

Q. When did the loan become in default?

A. The loan became --

MR. McGAVRAN: Object.

THE COURT: Overruled.

THE WITNESS: The loan became in default on May 31, 1983. That was when the note was due. It was not paid.

Q. Either prior to that time or just after that time, did you have an occasion to go to Florida to visit Mr. Hacker?

A. Yes, I did, at the end of May, I believe it was May 28, I'm not certain of that date, I traveled to Winterpark, Florida to discuss this

with Mr. Hacker.

Q. What was the purpose of your going down there?

A. To visit with him face-to-face and sit down and explain the seriousness of the problem and that we needed some action. We were vitally concerned and wanted to get our money paid back to us in accordance with the terms of the note.

Q. The various mares that were listed on the security agreement, do you recall approximately how many mares there were?

A. Originally, there were 35 mares listed on that agreement. I believe it was 35. We have a listing.

Q. What if anything did Mr. Hacker tell you in regard to those mares when he gave them to the bank as collateral?

A. These were given to the bank because the bank expressed an interest that if we were going to continue the relationship, we wished to have collateral. He gave us these as collateral, and indicated that their value was sufficient protection for our note, to the note we had outstanding.

Q. Subsequent to the issuance and execution by Mr. Hacker of the security agreement to the bank listing the 35 mares, what if anything did you find out about the existence of the 35 mares?

A. I don't understand the question.

Q. Did you find out that -- did you ever find out that there were less than 35 mares available of those that were listed on the security agreement?

A. Yes, we did.

Q. The ones that were missing, did you ever find out what had happened to them?

A. We were given some accounting. Never a detailed accounting. We were given a listing that indicated that --

MR. McGAVRAN: I want to object. This is hearsay, Your Honor.

THE COURT: It may well be but you are entitled to interrogate, Mr. McGavran. At this particular point, I've got to make a decision and I'm perfectly satisfied to accept this evidence. Objection overruled. Proceed.

THE WITNESS: We did receive a listing that some of the collateral had been sold. We have got a copy in our file of that list. Other collateral, in effect, disappeared, we did not know where the collateral, what happened to

the collateral.

Q. Do you know where the collateral is today?

A. No, we have made repeated attempts to get the certificates of full registration that we need. We have asked that they be sent to us. We have attempted for the last three and a half months to work with the client in liquidating the collateral and have not been able to. That's why we are here today.

Q. Mr. Schaefer, did you specifically write to Mr. Hacker requesting the certificates for these various horses?

A. On more than three occasions.

Q. What response did you receive on each occasion?

A. It was continual delay. We did receive one or two of the

certificates out of the 35, but never received the 35 original, full certificates.

Q. Of the total 35 mares that were listed, how many of those certificates do you have in the bank today?

A. I believe we have only two or three of those today.

Q. Were any of the certificates sent to racetracks in the United States?

A. Yes, I personally sent --

Q. How many?

A. At least two of those, one to Belmont and one to another, I forget the name of the other track in New York. At Mr. Hacker's request.

THE COURT: Out of the 35, you sent two to racetracks and you have two to three in the bank, you are missing

thirty, aren't you?

THE WITNESS: Yes.

THE COURT: Did you ever have them?

THE WITNESS: No.

THE COURT: Okay.

By Mr. Reisenfeld.

Q. Now, --

THE WITNESS: If we would have had them, the collateral could not have been sold and that is one of the problems.

By Mr. Reisenfeld:

Q. Now, Mr. Schaefer, are you familiar with the term seasons?

A. Yes, I am.

Q. What is your understanding of what seasons are?

A. The season is the breeding right for the user of the stallions. That's my understanding.

Q. Were you told by Mr. Hacker at the time he executed the security agreement that as part and parcel of your collateral that you would also be receiving seasons?

A. It was our understanding that when we took the collateral, in accordance with the security agreement, that we had the rights to that collateral and the products and proceeds of that collateral. In other words, if we have collateral, Your Honor, that eats, we have the right to the foals and colts.

Q. Were you recently made aware of the fact that Mr. Hacker, in fact, had sold these seasons?

A. Yes, yes, I was.

Q. Did he tell you that?

A. No. We found out through our own investigation.

Q. Were you surprised by that fact?

MR. McGAVRAN: I object, Your Honor.

THE COURT: Sustained.

By Mr. Reisenfeld:

Q. Do you know whether or not Mr. Hacker has received the proceeds from those seasons?

A. I do not know whether or not he has received the proceeds. I had a conversation with Mr. Hacker whereby he indicated he was going to receive some proceeds from those sales.

Q. When were those proceeds to be received, during what month?

A. In September of this year.

Q. How much are the proceeds that he's to receive from the seasons?

A. We do not know for certain. It's in the hundreds of thousands of

dollars figure.

Q. In June of 1983, did you have a discussion with counsel for Mr. Hacker?

A. Yes, I did.

Q. Was that Mr. Wachs?

A. Yes, it was.

Q. As a result of that discussion, was there a letter of agreement that was entered into between the bank and Mr. Hacker through counsel?

A. Yes, there was.

Q. And what was the basis or what was the premise of that particular agreement in June of 1983?

MR. McGAVRAN: Your Honor, I object. The document speaks for itself.

THE COURT: Overruled.

THE WITNESS: The basis of

that agreement is that we would work together in order to liquidate the collateral, specifically, that if we found a buyer for a stallion share or a horse, we would present that fact to Mr. Hacker, through Mr. Wachs, for example, on racehorse "Hold Your Piece", we have an offer for forty thousand dollars. At that point in time, Mr. Hacker had fifteen days to either find a better offer for that, or to give us, to agree with us to go ahead and liquidate the collateral. And that was the agreement for all the horses that we held.

Q. As a result of conversations with Mr. Wachs, were you aware of whether or not Mr. Wachs had possession of a certificate for "Hold Your Piece"?

A. I'm now aware that Mr. Wachs had that certificate. He had the

papers on "Hold Your Piece", that stallion syndication..

Q. Was there an agreement that the bank would receive forty thousand dollars, which was the purchase price for the "Hold Your Piece"?

A. Yes, that was stated by Mr. Wachs and Mr. Hacker to me.

Q. Has the bank received that forty thousand dollars as of today?

A. No, it has not.

Q. Was one of the other stallions involved a stallion called "River Man"?

A. Yes, it was.

Q. Was the bank able to obtain a purchaser for the "River Man"?

A. Yes, we were.

Q. What was the amount of money that the bank was to receive for "River Man"?

A. It was approximately $350,000.

Q. After receiving that particular offer, was the bank advised by counsel, Mr. Hacker's counsel, or Mr. Hacker that there was an offer in excess of the $350,000?

A. Yes, it was. He stated he had a better offer than that.

Q. Have you ever seen anything in writing to that effect?

A. No, we have not. In fact, the original agreement called for fifteen days. We gave Mr. Hacker sixty days to come up with a better offer because it was in his best interest and ours to find more money for our collateral and we tried our best to do it and could not.

Q. Wouldn't the bank be able to sell "River Man" with the present documentation that the bank has?

A. I believe it would, yes.

Q. Does the bank have a certificate for "River Man", to the best of your knowledge?

A. We have a file of ownership papers for "River Man".

Q. Do you know whether or not the prospective owner needed cooperation from Mr. Hacker or requested cooperation from Mr. Hacker?

A. Yes, he did.

Q. Did you discuss that with Mr. Hacker?

A. Yes, we did.

Q. Did you receive whatever cooperation was necessary from Mr. Hacker?

A. No, Mr. Hacker continually stated that he had a better offer and that it was continually forthcoming, which it never occurred.

Q. Was this also true with other

stallions?

A. Yes, it was.

MR. REISENFELD: You may inquire.

THE COURT: Mr. McGavran, do you wish to interrogate?

MR. McGAVRAN: I do, Your Honor. I repeat my request to have a five minute recess while I get Mr. Wachs over here.

THE COURT: If it wasn't important enough to have Mr. Wachs to be here, I'm not going to take a recess. If you wish to interrogate, feel free, if you don't wish to, I don't care.

CROSS-EXAMINATION

By Mr. McGavran:

Q. Did you bring with you, sir, the security agreements and the descriptions of collateral to which you

have referred in your testimony?

A. Yes, I believe Mr. Reisenfeld has a copy of those. I do not have a copy on my person.

MR. McGAVRAN: May I see them, sir? Your Honor, may I hand the clerk a document and ask her to mark it as Defendant's Exhibit 1 for identification, please?

THE CLERK: Defendant's Exhibit A, sir.

MR. McGAVRAN: Thank you.

Q. The clerk has handed you a document marked for identification as Defendant's Exhibit A. Would you identify that, please, if you can?

A. Defendant's Exhibit A is a copy of an affidavit listing the Fifth Third Bank as plaintiff vs. Stephen Hacker and S.J.H. Enterprises, Inc. as defendants.

Q. Do you find attached to that a copy of a certain security agreement that bears the date November 1, 1982?

A. Yes, I do.

Q. Is that the security agreement to which you've been referring in your testimony, sir?

A. That is correct.

Q. Mr. Schaefer, I saw in a reference in the complaint that your bank filed in this action, a reference to another security agreement dated June of 1982. Do you have a copy of that, sir?

A. Not in this packet of information I do not.

Q. Is it in the courtoom someplace so we may see it?

MR. REISENFELD: May it please the court, I'm more than willing, I'm looking at the complaint and I don't

see any reference to June of 1982. I'd be more than happy to make available to Mr. McGavran whatever we have.

THE COURT: Was there a second security agreement, was there a previous security agreement?

THE WITNESS: There have been numerous security agreements with Mr. Hacker through the years, yes.

Q. I invite your attention to the exhibits attached to the security agreement.

THE COURT: Excuse me. Which security agreement?

MR. McGAVRAN: I'm speaking of the one that is attached to Defendant's Exhibit A, Your Honor.

THE COURT: November first, 1982 security agreement?

MR. MCGAVRAN: Yes.

Q. Do you find attached to that a

document marked Exhibit A?

A. Yes, I do.

Q. Do you find in back of that, Mr. Schaefer, what appears to be a copy of a note with handwriting on the top and then the names of what apparently are four horses; do you have that, sir?

A. I have the copy of Exhibit A marked a note for $2,395,000, is that what you are referring to?

Q. No, I'm asking if in that package of material someplace you have attached documents that were exhibits to the security agreement dated November one, '82?

A. Yes.

Q. Do you have up at the top, it says Exhibit A and says "Steve's Jewel"?

A. Yes.

Q. Could you go to the next page?

Do you have what appears to be a copy of the note with handwriting?

A. Yes, a small, not a legal note, but a memo, yes.

Q. My question to you, sir, is were these two documents, the Exhibit A and the handwritten note attached to the November one, '82 security agreement when Mr. Hacker signed it?

A. The Exhibit A was and the Exhibit B was. I'm not certain whether this note was attached to that or not, sir.

Q. Do you know whose handwriting on the note says, "The following four are missing from list"?

A. I'm not certain whose handwriting that is. I believe it may be my secretary's handwriting but I'm not positive. It may be Mr. Hacker's secretary also.

Q. If you look at the Exhibit A list, Mr. Schaefer, you find that the names of the horses on that little note do appear about two-thirds of the way down, don't they, "March Pain", "'82 River Man", "Bell Sane" and "'82 Steak Dinner"?

A. Yes, they do.

Q. Was Exhibit A retyped after receipt of this note that says these following four are missing from list?

A. I'm not certain of that.

Q. Isn't it a fact that the Exhibit A list is different from the Exhibit A list that was attached to the security agreement when Mr. Hacker signed it?

A. No, there may have been, and I'm not certain because I don't have the documents in front of me, previous security agreements in which we held

certain horses as collateral.

Q. Well, that wasn't my question, sir. Would you read my question?

(Question read as requested.)

THE WITNESS: No, I do not believe it was.

By Mr. McGavran:

Q. Is the Exhibit A the list of 35 mares to which you referred in your testimony?

A. Yes, but there are approximately 35 on there or 34, or 35.

Q. Looking at this list, if you go to the third one down, "Pretty Sunny", isn't it true that that horse was sold with your knowledge and permission and the proceeds applied to seasons or upkeep for the horses?

A. I do not -- please ask that question again.

THE COURT: Read the question.

(Question read as requested.)

THE WITNESS: We found out that this horse was sold; after it was sold, okay, we did not receive the total proceeds from the sale of this horse.

Q. Well, isn't it true that the proceeds were applied for seasons and for upkeep of the horses?

A. I do not know where the proceeds that we did not receive were applied.

Q. You did receive part of the proceeds?

A. We did receive a portion of the proceeds for interest on the notes.

Q. Looking at the next horse, "82 Codex", you are aware, are you not, that that horse died?

A. Of the list, I'm not intimately familiar with every horse on

this list without the files that we have on them. It may have died, yes. We did not receive the insurance proceeds from that.

Q. Have you requested them?

A. Yes.

Q. When?

A. Throughout -- from the time the collateral was pledged on at least three occasions, we have written to Mr. Hacker between November of '82 and September of this year, requesting that we have full right and title to all these horses, plus the insurance proceeds. We do have the insurance on some of those. We do not have them on all of them.

THE COURT: What is the name of that horse that died?

MR. McGAVRAN: "'82 Codex".

THE COURT: Spell it.

MR. McGAVRAN: '82 C-O-D-E-X.

Q. You have not specifically requested the insurance proceeds of this horse, though, have you?

A. No, I'm not certain that this horse died, as I stated, there was a horse or two that died that we did not receive the insurance proceeds on.

Q. Isn't it true that the next horse, "Jacka's Lady" was sold at an OBS sale with your knowledge and consent?

A. We found out about the sale of this horse after it occurred. Let me state the answer this way. We have continually requested that Mr. Hacker liquidate the collateral and apply it to our note. That has not been done consistently. It has been done partially, extremely rarely, that he has sold them and given us the

proceeds. That, I believe, is why we are here today.

Q. You can't testify that you were given none of the proceeds of "Jacka's Lady"?

A. No, we were paid a certain amount of the interest due on our note from the sale of certain of these animals.

THE COURT: Have you been paid anything on the principal?

THE WITNESS: We have been paid a minor amount on the principal. I believe it is 25 or 50 thousand dollars in the past year and a half.

By Mr. McGavran:

Q. Isn't it true that "Distortion" was sold with your permission?

A. These horses, we have been pleading with Mr. Hacker to sell the

horses, okay. We did not find out about the sale 'til after it occurred. We did not receive the direct proceeds from this sale. We did not control the proceeds of the sale.

Q. Well, the fact is, you asked him to sell it and he sold it, right?

A. That's correct.

THE COURT: Isn't it reasonable that the request to sell also included remission of the proceeds? The collateral security is reduced each time a horse is sold. Wouldn't you expect that then a portion to reduce the debt would likewise occur?

MR. McGAVRAN: Your Honor, as I said --

THE COURT: Your questions, Mr. McGavran, I don't quite understand them. The witness has now testified

three times that they've asked him to liquidate the collateral, but not just liquidate the collateral, liquidate it and pay off the note.

MR. McGAVRAN: Your Honor, what we are missing due to, and I must again confess insufficient preparation, is knowledge of the amount of the sale, the value of the horse, and we concede that what to me are large sums of money were remitted to the bank as interest.

THE COURT: Yes, but that isn't sufficient, Mr. McGavran. If you have a hundred trucks as collateral for a five million dollar loan and you sell fifty trucks, I don't think you can justify your position by saying, well, we paid the interest. The answer is you've reduced the collateral security by fifty percent but you haven't reduced the note by fifty percent. All

I'm receiving from this witness is more and more conviction that there is a purpose to be served in the appointment of a receiver.

MR. McGAVRAN: Well, I would point out, Your Honor, with all respect, that without knowing the amount of the proceeds from the sale, we simply cannot say whether all or none of the proceeds were remitted and without other evidence, we cannot say that the balance of the proceeds was not applied to the care and feeding of the other collateral. I'm just saying we can't say that.

THE COURT: The obvious answer is that the debtor is insecure. Collateral is being disposed of and no payments on the note, or very, very minor payments on the note, unless you are prepared to establish that that's

incorrect, and Mr. McGavran, all I can tell you is, you are convincing me more and more that there's some reason to appoint a receiver, maybe for your client's protection as well. Maybe he is entitled to setoffs for the care and feeding of these horses. I can't tell. You may proceed.

By Mr. McGavran:

Q. Do you know whether or not "Kiss on the Whips" was sold?

A. I do not know. It may have been. Again, I don't know the exact status of each of these animals.

Q. How about "Hill Daisy", do you know whether or not "Hill Daisy" was sold?

MR. REISENFELD: Objection, I believe the witness has answered at least seven times.

THE COURT: Sustained.

By Mr. McGavran:

Q. Look at what is Exhibit B to the security agreement; do you have that?

A. Yes, I do.

Q. Is this the list of syndicates to which you referred in your testimony when you were questioned by Mr. Reisenfeld?

A. Yes, sir, it is.

Q. Do you know whether or not the syndicates have been transferred to the bank's name or the bank has been nominated?

A. I do not know whether or not we have been nominated. We were given a packet of papers on each of these stallions syndicates by Mr. Hacker, which he proposed were the ownership certificates and yes, we have the files that he had in our possession now.

Q. Is it your testimony that the bank is or is not able to sell interests in these syndicates with the documents in its possession?

A. It is our position that we are able to sell these stallions syndicates which we have.

Q. These have already been sold, sir?

A. No, they have not. None of them have been sold.

Q. Do you have in the courtroom a copy of the June agreement to which you've referred in your testimony?

A. A copy of the June, 1983 agreement?

Q. Yes, Mr. Schaefer.

A. Yes, we do. Mr. Reisenfeld has it.

MR. McGAVRAN: Thank you.

THE COURT: Mark it, please.

THE CLERK: Defendant's Exhibit B.

MR. McGAVRAN: May I see it for a moment, please?

THE COURT: Of course.

MR. McGAVRAN: Thank you, Your Honor, I have no further questions.

THE COURT: Anything further of this witness?

MR. REISENFELD: Nothing further.

THE COURT: Thank you.

MR. REISENFELD: If it please the court, I have other witnesses, if the court needs additional testimony.

THE COURT: No, I'm satisfied that there is some evidence here of insecurity. I think this plaintiff is entitled to the appointment of a receiver and I'm perfectly satisfied, upon request of the defendant, to set

this matter for a full dress hearing on terminating the receivership, but I suggest to counsel, once again, I have a choice of ways I can be wrong. If I must choose, I'm going to choose a way I think will protect the parties, rather than potentially damage it.

Accordingly, the motion for the appointment of receiver will be granted. I propose to appoint Robert Eddington, attorney in Cincinnati.

Mr. Reisenfeld, it is my policy that when I appoint a receiver, I do not appoint someone suggested by either party. The receiver is answerable to me and not to the parties.

MR. REISENFELD: I have nothing to suggest to the court.

THE COURT: Mr. Eddington is in the courtroom. Is there any suggestion as to bond that should be

imposed?

MR. McGAVRAN: I would suggest, Your Honor, I've heard the court's ruling and, with all respect, may I make one suggestion that goes to my point about bond? Again, I do not know what other credit agreements Mr. Hacker may be party to and I do not know what appointment of a receiver here may do to his business.

I simply can't tell the court. My suggestion would be if -- as the court does find the preliminary relief as warranted, could a temporary restraining order or a preliminary injunction satisfy the court's concern?

THE COURT: No, no, we are dealing with collateral which is mobile, volatile, alive. No way. So far as I'm concerned, I want these collateral brought under control of the

court. It may be for a limited time and I will be perfectly happy to hear from you, but a restraining order at this point against a person who, incidentally, is not within this district and, apparently, the horses are not either, so far as I'm concerned is not sufficient. Do you have any suggestion regarding bond?

MR. McGAVRAN: Yes, your Honor, I think a bond of at least two million five hundred thousand dollars is called for under the circumstances of this case, because the appointment of a receiver for the assets may have grave financial consequences to Mr. Hacker, and I believe that the bond should assure that if it's determined at a later date that the appointment should not have been made, Mr. Hacker can be justly compensated.

THE COURT: I don't see that Mr. Hacker can be damaged in the value of the horses. I don't quite follow that logic. Mr. Reisenfeld.

MR. REISENFELD: I would only suggest that the purpose of a bond is not to protect Mr. Hacker in the event that he's been harmed. That would certainly be the bank's responsibility, and the last I heard, they were not consulted. I would suggest to the court that a nominal bond would be in order so as not to put great pressure upon the receiver. I would suggest to the court that a fair bond of fifty to a hundred thousand dollars would be more than sufficient.

THE COURT: I'm inclined to agree with you, Mr. Reisenfeld. Obviously, the bank, if they have acted improperly and caused damage to Mr.

Hacker, they are liable.

MR. REISENFELD: Yes, your Honor, I understand that.

THE COURT: I'm going to set bond at one hundred thousand dollars. I will direct that momentarily, at least, the premium for that bond be advanced by the Fifth Third Bank. Anything further to come before the court in this matter?

MR. REISENFELD: Nothing further.

THE COURT: Mrs. Anderson.

(Court was adjourned at 4 p.m.)

FRIDAY AFTERNOON SESSION

SEPTEMBER 23, 1983

P R O C E E D I N G S

IN CHAMBERS:

THE COURT: This is in regard to Hacker, I presume. Mr. Eddington, you don't have to clean out the stables.

Mr. McGavran, what is the problem?

MR. McGAVRAN: Your Honor, I understood what the court did yesterday was to appoint a receiver for the collateral, and being more exact, for whatever interest Mr. Hacker had in the collateral. The order, as drafted, going down into right after it says, "It is therefore ordered," the order says, "Is appointed receiver of the property of Stephen J. Hacker and of the thoroughbred horses."

As drafted, the order makes Mr.

Eddington receiver of all of Mr. Hacker's property, which I did not think was the court's intent.

THE COURT: No.

MR. McGAVRAN: My suggestion to counsel for plaintiff was redrafting it to say, "Is appointed receiver for any and all interest of Stephen J. Hacker in --"

THE COURT: Let's see if we can make that simpler. "Is appointed receiver of the property interests of Stephen J. Hacker in certain thoroughbred horses and in undivided, fractional ownership shares of certain thoroughbred horses listed in Exhibits A and B." I think that is appropriate. That is all the bank has, I guess. Really, whatever Mr. Hacker has in connection with those horses, that would be their in rem rights, as

distinguished from whatever rights they may have against Mr. Hacker for failure to pay, which would be in personam.

Mr. Eddington is not receiver of any in personam action against Hacker.

MR. REISENFELD: I want to tell you two things as to why we put it the way we did. As you recall, one of the issues yesterday was the issue that in the security agreement, we were not only entitled to our interest in the thoroughbreds and the fractional shares, we were also entitled to the proceeds from that collateral.

As you recall yesterday, it's our understanding and belief that there has been a conversion of a number of horses that are listed on those documents. Now, we are not suggesting for a moment that Mr. Eddington has the right to go out and grab bank accounts and grab

pipelines and grab anything else, other than what he may find that Mr. Hacker now has that was converted to him by virtue of having sold collateral and received proceeds therefrom.

THE COURT: But I'm using the plural, "property interests" of Stephen J. Hacker in certain thoroughbred horses. I would assume that property interests include more than the animal on the hoof.

Is there any assertion that he may have sold his undivided, fractional shares?

MR. REISENFELD: Very possible that he did.

THE COURT: Let me think a minute. Appoint receiver of the property interests, Stephen J. Hacker in certain thoroughbred horses. I'm going to repeat, at the risk of being

redundant, "Is appointed receiver of the property interests of Stephen J. Hacker in undivided, fractional shares of certain thoroughbred horses." I do understand that when you have syndicated a stallion, you have certain property rights. I believe you have a right to nominate mares and that nominating is a saleable interest.

MR. REISENFELD: That's correct. As an example, we indicated to you yesterday that it's our belief at this very moment, there was approximately three hundred thousand due Mr. Hacker for the sale of seasons in various farms in Kentucky. Mr. Eddington is aware of this and Mr. Eddington had indicated that he wanted to serve a copy of this order on those farms in Kentucky so he can get that money if, in fact, that money comes

from shares we should be entitled to, and that is why we did it a little more clumsily than we should, but that's the reason.

THE COURT: No problem. I'm willing to make those changes. As a matter of fact, I will have this typed up right away and it can be put on.

MR. REISENFELD: That would be terrific.

THE COURT: I assume there is no problem, aside from the fact that you disagree with the appointment of a receiver at all, it is understood that he is a receiver for those interests, and not for Mr. Hacker, whatever he may own.

MR. McGAVRAN: That was the concern that led to the appearance today. One question, going on to the last sentence in this first paragraph,

your Honor. "The receiver has the authority to preserve, protect and collect all the horses." The problem I see there is it may be that there has been a sale of collateral in good faith for value to some third party, and I think the procedure would be that if Mr. Eddington chose to challenge such a sale, he would initiate a proceeding, he could not, on the strength of this order, seize the property.

THE COURT: I'm not sure. He might be able to bring a replevin action as receiver.

MR. McGAVRAN: I think he could bring an action, but what I'm concerned with is this order is drafted --

MR. REISENFELD: Without notice. Is that what you are concerned about?

MR. McGAVRAN: What I'm concerned about, on its face, this order may purport to give him the right to walk on, go to the farm of a purchaser and seize a horse and I don't think that he could do that without bringing an action challenging the sale.

THE COURT: Well, okay. He has the authority to do all things necessary to preserve, protect and collect the horses; whether or not, armed with this, he can go on to someone's property and pick up the animal, I'll sort that out later, but I want it understood that the receiver has power to do almost anything with these horses, and under the appropriate circumstances, go to someone's property, and it may well be that that person may have an action against Mr.

Hacker and I will, as I said, I'll sort it out later, but I'm going to let this stand. You have the authority to collect these horses. I can see you riding down Fifth Street right now with a whole string of them behind you and you're on the lead horse. We'll have a televison camera on that one. I think that is appropriate.

Mr. McGavran, I'm perfectly willing to amend this and retype it when we find out simply what we are talking about. The initial order is always a very broad one because nobody really knows what the status is, where these horses are, what shape they are in and so forth. I want the receiver to have broad authority.

Let me have that first page retyped. Mr. McGavran, it's up to you. If you would prefer not to endorse it

because it might embarass you with your client, it's no problem. You don't have to.

MR. MCGAVRAN: I would prefer not to endorse it.

THE COURT: No problem. I will put it on as the court's order, and, you know, this is a day when you have to be very cautious with your own clients of whether or not you may some day face them in an adversary fashion. I understand the problem and I'm not going to add to it. I will have this retyped and this will go on.

Anything further? Okay.

(Conference concluded at 2:45 p.m.)

- - - -

REPORTER'S CERTIFICATE

I, Linda M. Kuppin, Official Court Reporter for the United States District Court for the Southern District of Ohio, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/S/ LINDA M. KUPPIN
Linda M. Kuppin

(FILED SEPTEMBER 21, 1983)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FIFTH THIRD BANK 38 Fountain Square Plaza Cincinnati, Ohio 45202	*	CASE NO. C-1-83-1547
Plaintiff	*	
-vs-	*	
STEPHEN J. HACKER 427 South New York Avenue Winter Park, Florida 32789	*	C O M P L A I N T
and	*	
SJH ENTERPRISES, INC. 427 South New York Avenue Winter Park, Florida 32789	*	
Defendants	*	

COUNT ONE

(1) Jurisdiction is based

upon diversity of citizenship pursuant to 28 U.S.C. §1332. The amount in controversy exceeds $10,000, exclusive of interest and costs.

(2) On or about February 28, 1983, Stephen J. Hacker executed a Promissory Note, payable to the order of Fifth Third Bank in the amount of $2,395,273.92. This Promissory Note was a renewal of an already existing loan to Stephen J. Hacker from Fifth Third Bank. A copy of the Note is attached hereto as Exhibit "A" and incorporated herein by reference.

(3) Defendant Stephen J. Hacker is in default on said Note. Notice has been given to Defendant of the default. Defendant has refused to pay the amount due.

(4) There is due and owing to Plaintiff $2,345,273.92 principal plus

interest at the rate of 11 1/2% per annum from August 1, 1983.

COUNT TWO

(5) Paragraphs one through four are incorporated herein as though fully rewritten.

(6) On or about April 13, 1979, in consideration of the loan given to Defendant Stephen J. Hacker by Fifth Third Bank, Defendant SJH Enterprises, Inc. executed an "Unlimited Payment Guaranty" whereby it agreed to guarantee the prompt payment of all monies due under the Note executed by Defendant Stephen J. Hacker to Plaintiff. Said Guaranty was absolute and unconditional. A copy of said Guaranty is attached hereto as Exhibit "B" and incorporated herein by reference.

(7) Defendant SJH Enterprises, Inc. is in breach of its Guaranty of payment to Plaintiff of the Note which was executed by Defendant Stephen J. Hacker to Plaintiff in that said Note is overdue and remains unpaid.

(8) Demand for payment has been made upon SJH Enterprises, Inc. and no payment has been received from SJH Enterprises, Inc.

(9) There is due and owing to Plaintiff by reason of said breach, $2,345,273.92 principal plus interest at the rate of 11 1/2% per annum after August 1, 1983.

WHEREFORE, Plaintiff demands judgment in the amount of $2,345,273.92 plus interest at the rate of 11 1/2% per annum on Count One; $2,345,273.92 plus interest at the rate of 11 1/2%

per annum on Count Two, plus interests, costs, and all other relief to which Plaintiff is justly entitled.

Respectfully Submitted,

REISENFELD & ASSOCIATES

/S/ LOUISE M. ROSELLE
LOUISE M. ROSELLE
Attorney for Plaintiff
Auburn Barrister House
2355 Auburn Avenue
Cincinnati, Ohio 45219
381-6810

OF COUNSEL:

REISENFELD & ASSOCIATES
Auburn Barrister House
2355 Auburn Avenue
Cincinnati, Ohio 45219
(513) 381-6810

(FILED SEPTEMBER 21, 1983)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FIFTH THIRD BANK	*	CASE NO. C-1-83-1547
Plaintiff	*	
-vs-	*	
STEPHEN J. HACKER	*	MOTION FOR APPOINTMENT
and	*	OF RECEIVER
SJH ENTERPRISES, INC.	*	
Defendants	*	

Now comes Plaintiff, by and through its counsel, and respectfully moves this Court for an order appointing a receiver to take control and custody of Defendant Stephen J. Hacker's property, and in support of its Motion, alleges the following:

(1) Jurisdiction is based

upon diversity of citizenship pursuant to 28 U.S.C. §1332. Amount in controversy exceeds $10,000, exclusive of interest and costs.

(2) On or about February 28, 1983, Defendant Stephen J. Hacker executed a Promissory Note payable to the order of Plaintiff in the amount of $2,395,273.92. This Promissory Note was a renewal of an already existing loan to Stephen J. Hacker from Fifth Third Bank.

(3) As collateral for the loan, Defendant Stephen J. Hacker gave Plaintiff a security interest in certain thoroughbred horses and undivided fractional ownership shares in certain horse syndicates.

(4) Stephen J. Hacker is in default of payment of the Promissory Note. Notice has been given to

Defendant Stephen J. Hacker of the default.

(5) Plaintiff has ascertained that Defendant Stephen J. Hacker is insolvent or nearly insolvent, without sufficient assets to meet the demand of Plaintiff.

(6) Plaintiff has reasonable cause to believe that Defendant Stephen J. Hacker has transferred or will transfer the collateral to third parties in an attempt to defeat Plaintiff's security rights therein.

(7) Plaintiff's rights and interests, as set forth in the Affidavit attached, will be irreparably injured unless a receiver is appointed to take possession and control of the property. A Complaint is being filed by Plaintiff against Defendants in this Court.

(8) Plaintiff is a creditor and has a security interest in the property for which receivership is sought. A copy of the Financing Statement and Security Agreement is attached to the Affidavit attached hereto.

(9) Plaintiff has no adequate remedy at law. The injunctive remedy available in this Court would be inadequate and ineffective.

(10) Plaintiff has tried to work with Stephen J. Hacker towards an orderly liquidation of the collateral, but Defendant Stephen J. Hacker has not cooperated with Plaintiff.

(11) The collateral is located in several states in the United States and is held by third parties. State Court actions would be ineffective in this case.

(12) This Motion is based on Plaintiff's Complaint, a copy of which is attached hereto as Exhibit "A" and on the Affidavit of a representative of Fifth Third Bank, attached hereto.

REISENFELD & ASSOCIATES

/S/ LOUISE M. ROSELLE
LOUISE M. ROSELLE
Attorney for Plaintiff
Auburn Barrister House
2355 Auburn Avenue
Cincinnati, Ohio 45219
(513) 381-6810

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been sent to all parties or their counsel of record by regular U.S. Mail this 21st day of September, 1983.

/S/ LOUISE M. ROSELLE
LOUISE M. ROSELLE
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FIFTH THIRD BANK	*	CASE NO.
Plaintiff	*	_____
-vs-	*	A F F I D A V I T
STEPHEN J. HACKER	*	
and	*	
SJH ENTERPRISES, INC.	*	
Defendants	*	

GEORGE A. SCHAEFER, JR., being first duly cautioned and sworn, deposes and states the following:

(1) That he is a Senior Vice President of Fifth Third Bank, Plaintiff, in this action, and this Affidavit is filed in support of its Motion for Appointment of a Receiver for the property described in said Motion;

(2) That, to the best of

Plaintiff's knowledge, the property is in possession of Defendant Stephen J. Hacker or Defendant has access to the subject property;

(3) That Plaintiff has an interest and a right to said property by virtue of a Promissory Note executed by Stephen J. Hacker on or about February 28, 1983; and a Security Agreement executed by Stephen J. Hacker on or about November 1, 1982.

(4) That true and correct copies of the Promissory Note, the Security Agreement, and the Financing Statement are attached hereto and incorporated herein by reference.

(5) That Plaintiff believes it is necessary for the protection of its rights that a receiver be appointed for said property for the reason that Plaintiff has not received the

Certificate of Registration for many of the horses from Stephen J. Hacker, despite repeated demands; that Plaintiff believes it has the authority to convey good title, but it is concerned that a prospective buyer might question that; and that Plaintiff has reasonable cause to believe that Defendant Stephen J. Hacker has transferred or will transfer the property to a third party in an attempt to defeat Plaintiff's rights therein and that Plaintiff will be irreparably harmed therefrom;

(6) That Plaintiff has tried to work with Stephen J. Hacker towards an orderly liquidation of the collateral, but Defendant Stephen J. Hacker has not cooperated with Plaintiff;

(7) That the value of the

property for which a receiver is sought is in excess of $500,000.00;

(8) That no previous application for a receiver has been made by Plaintiff.

Further Affiant Sayeth Naught.

_____
GEORGE A. SCHAEFER, JR.

Sworn to before me and subscribed in my presence this _____ day of September, 1983.

_____
NOTARY PUBLIC

(FILED SEPTEMBER 22, 1983)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

FIFTH THIRD BANK,	:	Case No. C-1-83-1547
Plaintiff,	:	Judge Rubin
v.	:	
STEPHEN J. HACKER, et al.	:	DEFENDANTS' MOTION FOR A CONTINUANCE OF HEARING
Defendants.	:	

Defendants move the Court for a thirty day continuance of the hearing on Plaintiff's Motion to Appoint a Receiver on the grounds that this action and Motion were filed on September 21, 1983; that Defendants' counsel was first advised by Plaintiff's counsel of this action and Motion at about 9:00 A.M. on September 22, 1983; that Defendants' counsel

obtained a copy of pleadings herein thereafter; that Defendants' counsel were only able to reach Defendant Stephen J. Hacker by telephone in Houston, Texas, at about 11:40 A.M.; and that there are substantial questions of law and fact on Plaintiff's Motion which require the presence of Mr. Hacker and research by counsel to present to the Court.

/S/ FREDERICK J. McGAVRAN
Frederick J. McGavran
Trial Attorney for Defendants
2500 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 651-6800

OF COUNSEL:

FROST & JACOBS
2500 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 651-6800

Certification of Service

I hereby certify I served a copy of the foregoing Motion and Memorandum in support thereof upon Louise M. Roselle, Esq., Trial Attorney for Plaintiff, by hand delivery this 22nd day of September, 1983.

/S/ FREDERICK J. McGAVRAN
Frederick J. McGavran

MEMORANDUM

Although this action and Plaintiff's Motion to Appoint a Receiver were filed and the Motion was set for hearing by the Court on September 21, 1983, Defendants' counsel, who was known to Plaintiff, was not advised of the filing of the Complaint and Motion or the setting of the Motion until about 9:00 A.M. on September 22, 1983. Thereafter, Defendants' counsel obtained copies of pleadings herein from the clerk of this Court and copies were delivered by Plaintiff's counsel. Defendants' counsel was unable to reach Defendant Stephen J. Hacker by telephone in Houston, Texas, until about 11:40 A.M. on September 22, 1983. It appears to Defendants' counsel that there are substantial issues of law and fact on

Plaintiff's Motion to Appoint a Receiver which require the presence of Mr. Hacker and additional research and preparation by counsel to present to the Court.

Questions which may be raised include:

Jurisdiction over Defendants' persons

Insufficiency of Service of Process

Venue

Jurisdiction over the alleged collateral

Identity of collateral

Knowledge and consent of Plaintiff to acts of Defendants alleged in Motion

Willingness of Defendants to deliver collateral to

Plaintiff

Without Mr. Hacker present in the courtroom to consult with counsel and to testify, the interests of Defendants simply cannot be protected. Mr. Hacker is presently in Houston, Texas on business and, at the time he was advised of this action and Motion, had scheduled meetings and business activities through September 23rd. Thereafter, he has planned to go to the Middle East on business. At the earliest, Mr. Hacker could be available in two weeks. Because of the nature of the allegations of the Motion to Appoint a Receiver, however, and the legal and factual issues raised by the Motion and the Complaint, it is respectfully requested that this hearing be continued thirty days for Defendants and counsel to prepare a

defense.

Respectfully submitted,

/S/ FREDERICK J. McGAVRAN
Frederick J. McGavran
Trial Attorney for
Defendants

§ 2503.20 Reporter shall attend sessions of court; publication of court reports. (GC §1483)

When requested by the supreme court, the reporter of the supreme court shall attend its sessions and consultations and shall report and prepare its decisions for publication under its direction. Such reporter shall prepare for publication and edit, tabulate, and index those opinions and decisions of any court of appeals furnished him for publication by any such court, and such opinions and decisions of any of the inferior courts, as may be designated by him and approved by the chief justice of the supreme court.

No cases in the court of appeals shall be reported for publication except those selected by the several

courts of appeals, or by a majority of the judges thereof. Such reporter may, with the consent of the supreme court, appoint assistants necessary to carry on the work of his office. The compensation of each of such assistants shall not exceed two thousand dollars a year, to be paid out of the state treasury upon the warrant of the auditor of state.

Whenever a case is reported for publication, the syllabus of such case shall be prepared by the judge delivering the opinion, and approved by a majority of the members of the court. Such report may be per curiam, or if an opinion is reported, such opinion shall be written in as concise form as may be consistent with a clear presentation of the law of the case. Opinions for permanent publication in book form

shall be furnished to the reporter and to no other person. After August 15, 1919, all such cases must be reported in accordance with this section before they shall be recognized by and receive the official sanction of any court.

§ 2715.04 [Defendant may request hearing on motion.]

A defendant against whom a motion for attachment is filed under section 2715.03 of the Revised Code may receive a hearing on the motion in accordance with section 2715.043 [2715.04.3] of the Revised Code by delivering a written request for a hearing to the court within five business days after receipt of the notice provided pursuant to section 2715.041 [2715.04.1] of the Revised Code. The request may set forth the defendant's reasons for disputing the claim of the plaintiff who filed the motion for attachment of the property; however neither the defendant's inclusion of nor his failure to include such reasons upon the request constitutes a waiver of any defense of the defendant or affects the

defendant's right to produce evidence at any hearing or at the trial of the action. The time and place for the hearing shall be that set forth in the notice. If a written request for a hearing is not received by the court within the prescribed time, the hearing scheduled pursuant to section 2715.043 [2715.04.3] of the Revised Code shall be canceled. However, the court may grant a continuance of the scheduled hearing in accordance with division (B) of section 2715.042 [2715.04.2] of the Revised Code.

§ 2715.041 [Form for notice to defendant.]

(A) Upon the filing of a motion for an order of attachment pursuant to section 2715.03 of the Revised Code, the plaintiff shall file with the clerk of the court a praecipe instructing the clerk to issue to the defendant against whom the motion was filed a notice of the proceeding. Upon receipt of the praecipe, the clerk shall issue the notice which shall be in substantially the following form:

"(Name and Address of Court)

Case No. . . . . .

(Case Caption)

NOTICE

You are hereby notified that (name and address of plaintiff), the plaintiff in this proceeding, has applied to this court for the

attachment of property in your possession. The basis for this application is indicated in the documents that are enclosed with this notice.

The law of Ohio and the United States provides that certain benefit payments cannot be taken from you to pay a debt. Typical among the benefits that cannot be attached or executed on by a creditor are:

(1) Workers' compensation benefits;

(2) Unemployment compensation payments;

(3) Aid to dependent children (A.D.C.);

(4) Poor relief or general relief (G.R.);

(5) Social Security benefits;

(6) Supplemental security income

(S.S.I.);

(7) Veteran's benefits;

(8) Black lung benefits;

(9) Certain pensions.

Additionally, your wages never can be taken to pay a debt until a judgment has been obtained against you. There may be other benefits not included in this list that apply in your case.

If you dispute the plaintiff's claim and believe that you are entitled to retain possession of the property because it is exempt or for any other reason, you may request a hearing before this court by disputing the claim in the request for hearing form appearing below, or in a substantially similar form, and delivering the request for the hearing to this court, at the office of (title of court official), not later than the end of

the fifth business day after you receive this notice. You may state your reasons for disputing the claim in the space provided on the form, but you are not required to do so. If you do state your reasons for disputing the claim in the space provided on the form, you are not prohibited from stating any other reasons at the hearing, and if you do not state your reasons, it will not be held against you by the court and you can state your reasons at the hearing.

If you request a hearing, it will be conducted in . . . . . courtroom . . . . . ., (address of court), at . . . . . m. on . . . . . ., 19 . . . .

You may avoid having a hearing but retain posession of the property until the entry of final judgment in the action by filing with the court, at the office (title of court official), not later than the end of the fifth business day after you receive this notice a bond executed by an acceptable surety in the amount of $ . . . . . .

If you do not request a hearing or file a bond on or before the end of the fifth business day after you receive this notice, the court, without further notice to you, may order a law enforcement officer to take possession of the property. Notice of the dates, times, places and purposes of any subsequent hearings and of the date, time, and place of the trial of the action will be sent to you.

_____

Clerk of Court

Date:_____

(B) Along with the notice required by division (A) of this section, the clerk of the court also shall deliver to the defendant, in accordance with division (C) of this section, a request for hearing form together with a postage paid, self-addressed envelope or a request for hearing form on a postage paid, self-addressed postcard. The request for hearing shall be in substantially the following form:

"(Name and Address of Court)

Case Number_____

Date_____

REQUEST FOR HEARING

I dispute the claim for the attachment of property in the above case and request that a hearing in this matter be held at the time and place

set forth in the notice that I previously received.

I dispute the claim for the following reasons: _____

_____

_____

_____

_____

(Optional)_____

_____
(Name of Defendant)

_____
(Signature)

_____
(Date)

WARNING: IF YOU DO NOT DELIVER THIS REQUEST FOR HEARING OR A REQUEST IN A SUBSTANTIALLY SIMILAR FORM TO THE OFFICE OF THE (TITLE OF COURT OFFICIAL) OF THIS COURT WITHIN FIVE (5) BUSINESS

DAYS OF YOUR RECEIPT OF IT, YOU WAIVE YOUR RIGHT TO A HEARING AT THIS TIME AND YOU MAY BE REQUIRED TO GIVE UP THE PROPERTY SOUGHT WITHOUT A HEARING."

(C) The notice required by division (A) of this section shall be served on the defendant in duplicate not less than seven business days prior to the date on which the hearing is scheduled, together with a copy of the complaint and summons, if not previously served, and a copy of the motion for the attachment of property and the affidavit attached to the motion, in the same manner as provided in the Rules of Civil Procedure for the service of process. Service may be effected by publication as provided in the Rules of Civil Procedure except that the number of weeks for publication may be reduced by the court

to the extent appropriate.

§ 2715.042 [Conditions for issuance of order without hearing; continuance of hearing.]

(A) If a motion for an order of attachment has been filed pursuant to section 2715.03 of the Revised Code, the court may issue an order of attachment without conducting a hearing if it finds all of the following:

(1) The notice, motion, and affidavit have been served on the defendant against whom the motion for attachment was filed as required by section 2715.041 [2715.04.1] of the Revised Code;

(2) The defendant has not requested a hearing within the prescribed time pursuant to section 2715.04 of the Revised Code, and a continuance of the scheduled hearing has not been granted pursuant to

division (B) of this section;

(3) A bond has not been filed within the prescribed time pursuant to section 2715.10 or 2715.26 of the Revised Code;

(4) The court finds, on the basis of the affidavit, that there is probable cause to support the motion.

(B) If the defendant against whom a motion for an order of attachment was filed pursuant to section 2715.03 of the Revised Code does not request a hearing on the motion within the prescribed time pursuant to section 2715.04 of the Revised Code, the court nevertheless may grant a continuance of the scheduled hearing if the defendant, prior to the time at which the hearing was scheduled, as indicated on the notice served on the defendant under section 2715.04 of the Revised Code,

establishes a reasonable justification for his failure to request the hearing within the prescribed time. If the court grants such a continuance of the hearing, it shall cause the matter to be set for hearing as soon as practicable thereafter. The continued hearing shall be conducted in accordance with section 2715.043 [2715.04.3] of the Revised Code.

(C) The court shall not issue an order of attachment without a hearing pursuant to division (A) of this section if it grants a continuance of the scheduled hearing pursuant to division (B) of this section.

§ 2715.043 [Hearing; issuance of order upon probable cause; notice of hearing and trial.]

(A) Upon the filing of the motion for an order of attachment pursuant to section 2715.03 of the Revised Code, the court shall cause the matter to be set for hearing within twenty days thereafter and the defendant shall be notified in accordance with section 2715.041 [2715.04.1] of the Revised Code.

(B) If a hearing is requested in accordance with section 2715.04 of the Revised Code or if a continuance is granted in accordance with division (B) of section 2715.042 [2715.04.2] of the Revised Code, the hearing shall be limited to a consideration of whether there is probable cause to support the motion and whether any of the property

of the defendant is exempt from attachment.

The court shall issue an order of attachment if it finds, on the basis of the affidavit and, if applicable, the evidence presented at the hearing, that there is probable cause to support the motion.

(C) Any failure of the defendant against whom the motion for attachment was filed to oppose the motion or to refute any evidence presented by the plaintiff that filed the motion shall not constitute a waiver of any defense of the defendant or affect the defendant's right to produce evidence at subsequent hearings or at the trial of the action.

(D) The defendant against whom the motion for attachment was filed shall be sent prior notice of the date, time,

place, and purpose of any hearing other than the hearing set under division (A) of this section and of the date, time, and place of the trial of the action.

§ 2715.045 [Conditions for issuance of order without notice or hearing; notice and request for hearing form.]

(A) Upon the filing of a motion for attachment, the court may issue an order of attachment without issuing notice to the defendant against whom the motion was filed and without conducting a hearing if the court finds that there is probable cause to support the motion and that the plaintiff that filed the motion for attachment will suffer irreparable injury if the order is delayed until the defendant against whom the motion has been filed has been given the opportunity for a hearing. The court's findings shall be based upon the motion and affidavit filed pursuant to section 2715.03 of the Revised Code and any other relevant evidence that it may wish to consider.

(B) A finding by the court that the plaintiff will suffer irreparable injury may be made only if the court finds the existence of either of the following circumstances:

(1) There is present danger that the property will be immediately disposed of, concealed, or placed beyond the jurisdiction of the court;

(2) The value of the property will be impaired substantially if the issuance of an order of attachment is delayed.

(C)(1) Upon the issuance by a court of an order of attachment without notice and hearing pursuant to this section, the plaintiff shall file the order with the clerk of the court, together with a praecipe instructing the clerk to issue to the defendant against whom the order was issued a

copy of the motion, affidavit, and order of attachment, and a notice that an order of attachment was issued and that the defendant has a right to a hearing on the matter. The clerk then immediately shall serve upon the defendant, in the manner provided by the Rules of Civil Procedure for service of process, a copy of the complaint and summons, if not previously served, a copy of the motion, affidavit, and order of attachment, and the following notice:

"(Name and Address of the Court)

(Case Caption) Case No._____

NOTICE

You are hereby notified that this court has issued an order in the above case in favor of (name and address of plaintiff), the plaintiff in this proceeding, directing that property now

in your possession, be taken from you. This order was issued on the basis of the plaintiff's claim against you as indicated in the documents that are enclosed with this notice.

The law of Ohio and the United States provides that certain benefit payments cannot be taken from you to pay a debt. Typical among the benefits that cannot be attached or executed on by a creditor are:

(1) Workers' compensation benefits;

(2) Unemployment compensation payments;

(3) Aid to dependent children (A.D.C.);

(4) Poor relief or general relief (G.R.);

(5) Social security benefits;

(6) Supplemental security income

(S.S.I.);

(7) Veteran's benefits;

(8) Black lung benefits;

(9) Certain pensions.

Additionally, your wages never can be taken to pay a debt until a judgment has been obtained against you. There may be other benfits not included in this list that apply in your case.

If you dispute the plaintiff's claim and believe that you are entitled to possession of the property because it is exempt or for any other reason, you may request a hearing before this court by disputing the claim in the request for hearing form, appearing below, or in a substantially similar form, and delivering the request for hearing to this court at the above address, at the office of (title of court official), no later than the end

of the fifth business day after you receive this notice. You may state your reasons for disputing the claim in the space provided on the form; however, you are not required to do so. If you do state your reasons for disputing the claim, you are not prohibited from stating any other reasons at the hearing, and if you do not state your reasons, it will not be held against you by the court and you can state your reasons at the hearing. If you request a hearing, it will be held within three business days after delivery of your request for hearing and notice of the date, time, and place of the hearing will be sent to you.

You may avoid a hearing but recover and retain posession of the property until the entry of final judgment in the action by filing with the court, at

the office of (title of court official), not later than the end of the fifth business day after you receive this notice a bond executed by an acceptable surety in the amount of $_____.

If you do not request a hearing or file a bond before the end of the fifth business day after you receive this notice, possession of the property will be withheld from you during the pendency of the action. Notice of the dates, times, places, and purposes of any subsequent hearings and of the date, time, and place of the trial of the action will be sent to you.

_____
Clerk of Court

_____
Date"

(2) Along with the notice required

by division (C)(1) of this section, the clerk of the court also shall deliver to the defendant a request for hearing form together with a postage paid, self-addressed envelope or a request for hearing form on a postage paid, self-addressed postcard. The request for hearing shall be in substantially the following form:

"(Name and Address of Court)

Case Number_____

Date_____

REQUEST FOR HEARING

I dispute the claim for possession of property in the above case and request that a hearing in this matter be held within three business days after delivery of this request to the court.

I dispute the claim for the following reasons:

_____

_____

(Optional)_____

_____
(Name of Defendant)

_____
(Signature)

_____
(Date)

WARNING: IF YOU DO NOT DELIVER THIS REQUEST FOR HEARING OR A REQUEST IN A SUBSTANTIALLY SIMILAR FORM TO THE OFFICE OF THE (TITLE OF COURT OFFICIAL) OF THIS COURT WITHIN FIVE (5) BUSINESS DAYS OF YOUR RECEIPT OF IT, YOU WAIVE YOUR RIGHT TO A HEARING AND POSSESSION OF THE PROPERTY WILL BE WITHHELD FROM YOU DURING THE PENDENCY OF THE ACTION."

(D) The defendant may receive a hearing in accordance with section

2715.043 [2715.04.3] of the Revised Code by delivering a written request for hearing to the court within five business days after receipt of the notice provided pursuant to division (C) of this section. The request may set forth the defendant's reasons for disputing the plaintiff's claim for possession of property. However, neither the defendant's inclusion of nor his failure to include such reasons upon the request constitutes a waiver of any defense of the defendant or affects the defendant's right to produce evidence at any hearing or at the trial of the action. If the request is made by the defendant, the court shall schedule a hearing within three business days after the request is made, send notice to the parties of the date, time, and place of the

hearing, and hold the hearing accordingly.

(E) If, after hearing, the court finds that there is not probable cause to support the motion, it shall order that the property be redelivered to the defendant without the condition of bond.

Ohio Revised Code Chapter 2735.

§ 2735.01 Appointment of receiver. (GC § 11894)

A receiver may be appointed by the supreme court or a judge thereof, the court of appeals or a judge thereof in his district, the court of common pleas or a judge thereof in his county, or the probate court, in causes pending in such courts respectively, in the following cases:

(A) In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject property or a fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of a party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and

when it is shown that the property or fund is in danger of being lost, removed, or materially injured;

(B) In an action by a mortgagee, for the foreclosure of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt;

(C) After judgment, to carry the judgment into effect;

(D) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the

property in satisfaction of the judgment;

(E) When a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

(F) In all other cases in which receivers have been appointed by the usages of equity.

§ 2735.02 Qualifications of receiver. (GC § 11895)

No party, attorney, or person interested in an action shall be appointed receiver therein except by consent of the parties. No person except a resident of this state shall be appointed or act as receiver of a railroad or other corporation within this state.

§ 2735.03 Oath and bond. (GC § 11896)

Before a receiver appointed as provided in section 2735.01 of the Revised Code enters upon his duties, he must be sworn to perform his duties faithfully, and, with surety approved by the court, judge, or clerk, execute a bond to such person, and in such sum as the court or judge directs, to the effect that such receiver will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein.

§ 2735.04 Powers of receiver. (GC § 11897)

Under the control of the court which appointed him, as provided in section 2735.01 of the Revised Code, a receiver may bring and defend actions in his own name as receiver, take and keep possession of property, receive rents, collect, compound for, and

compromise demands, make transfers, and generally do such acts respecting the property as the court authorizes.

§ 2735.05 Examination. (GC § 11897-1)

On application of the receiver or of a creditor, the court appointing such receiver as provided in section 2735.01 of the Revised Code may, upon reasonable notice, require any person, or officer or director of a corporation, or member of a partnership for which a receiver has been appointed, to attend and submit to an examination on oath as to its property, trade, dealings with others, accounts, and debts due or claimed from it, and as to all other matters concerning the property and estate of the person, partnership, or corporation for which such receiver has been appointed.

§ 2735.06 Investment of funds by receiver. (GC § 11898)

By order of the court appointing a receiver as provided in section 2735.01 of the Revised Code, funds in the hands of such receiver may be invested upon interest. No such order shall be made except upon the consent of all the parties to the action.

§ 2737.04 [Respondent may request hearing; cancellation of hearing.]

A respondent to a motion filed under section 2737.03 of the Revised Code may receive a hearing on the motion in accordance with section 2737.07 of the Revised Code by delivering a written request for a hearing to the court within five business days after receipt of the notice provided pursuant to section 2737.05 of the Revised Code. The request may set forth the respondent's reasons for disputing the movant's claim for possession of the property. However, neither the respondent's inclusion of nor his failure to include such reasons upon the request constitutes a waiver of any defense of the respondent or affects the respondent's right to produce evidence

at any hearing or at the trial of the action. The time and place for the hearing shall be that set forth in the notice. If a written request for a hearing is not received by the court within the prescribed time, the hearing scheduled pursuant to section 2737.07 of the Revised Code shall be canceled. However, the court may grant a continuance of the scheduled hearing in accordance with division (B) of section 2737.06 of the Revised Code.

§ 2737.05 [Notice to respondent; request for hearing form.]

(A) Upon the filing of a motion for an order of possession pursuant to section 2737.03 of the Revised Code, the movant shall file with the clerk of the court a praecipe instructing the clerk to issue to the respondent a notice of the proceeding. Upon receipt of the praecipe, the clerk shall issue the notice which shall be in substantially the following form:

"(Name and Address of Court)

Case No. _____

(Case Caption)

NOTICE

You are hereby notified that (name and address of movant), the movant in this proceeding, has applied to this court for the recovery of possession of (describe property) claimed to be in

your possession. The basis for this application is indicated in the documents that are enclosed with this notice.

If you dispute the movant's claim and believe that you are entitled to retain possession of the property because it is exempt or for any other reason, you may request a hearing before this court by disputing the claim in the request for hearing form appearing below, or in a substantially similar form, and delivering the request for the hearing to this court, at the office of (title of court official), not later than the end of the fifth business day after you receive this notice. You may state your reasons for disputing the claim in the space provided on the form; however, you are not required to do so.

If you do state your reasons for disputing the claim, you are not prohibited from stating any other reasons at the hearing, and if you do not state your reasons, it will not be held against you by the court and you can state your reasons at the hearing.

If you request a hearing, it will be conducted in

_____ courtroom _____,

(address of court), at

____m. on _____, 19___.

You may avoid having a hearing but retain possession of the property until the entry of final judgment in the action by filing with the court, at the office of (title of court official), not later than the end of the fifth business day after you receive this notice a bond executed by an acceptable surety in the amount of $_____.

If you do not request a hearing or file a bond on or before the end of the fifth business day after you receive this notice, the court, without further notice to you, may order a law enforcement officer to take possession of the property. Notice of the dates, times, places, and purposes of any subsequent hearings and of the date, time, and place of the trial of the action will be sent to you.

_____
Clerk of Court

Date:_____

(B) Along with the notice required by division (A) of this section, the clerk of the court also shall deliver to the respondent, in acccordance with division (C) of this section, a request for hearing form together with a postage paid, self-addressed envelope

or a request for hearing form on a postage paid, self-addressed postcard. The request for hearing shall be in substantially the following form:

"(Name and Address of Court)

Case Number_____

Date_____

REQUEST FOR HEARING

I dispute the claim for the possession of property in the above case and request that a hearing in this matter be held at the time and place set forth in the notice that I previously received.

I dispute the claim for the following reasons:_____

_____

_____

(Optional)_____

_____

(Name of Respondent)

_____
(Signature)

_____
(Date)

WARNING: IF YOU DO NOT DELIVER THIS REQUEST FOR HEARING OR A REQUEST IN A SUBSTANTIALLY SIMILAR FORM TO THE OFFICE OF THE (TITLE OF COURT OFFICIAL) OF THIS COURT WITHIN FIVE (5) BUSINESS DAYS OF YOUR RECEIPT OF IT, YOU WAIVE YOUR RIGHT TO A HEARING AT THIS TIME AND YOU MAY BE REQUIRED TO GIVE UP THE PROPERTY SOUGHT WITHOUT A HEARING."

(C) The notice required by division (A) of this section shall be served on the respondent in duplicate not less than seven business days prior to the date on which the hearing is scheduled, together with a copy of the complaint and summons, if not previously served, and a copy of the

motion for the delivery of property and the affidavit attached to the motion, in the same manner as provided in the Rules of Civil Procedure for the service of process. Service may be effected by publication as provided in the Rules of Civil Procedure except that the number of weeks for publication may be reduced by the court to the extent appropriate.

§ 2737.06 [Conditions for issuance of order without hearing; continuance of hearing.]

(A) If a motion for an order of possession has been filed pursuant to section 2737.03 of the Revised Code, the court may issue an order of possession without conducting a hearing if it finds all of the following:

(1) The notice, motion, and affidavit have been served on the respondent as required by section 2737.05 of the Revised Code;

(2) The respondent has not requested a hearing within the prescribed time pursuant to section 2737.04 of the Revised Code, and a continuance of the scheduled hearing has not been granted pursuant to division (B) of this section;

(3) The respondent has not filed a

bond within the prescribed time pursuant to section 2737.11 of the Revised Code;

(4) The court finds, on the basis of the affidavit, that there is probable cause to support the motion.

(B) If the respondent does not request a hearing on the motion within the prescribed time pursuant to section 2737.04 of the Revised Code, the court nevertheless may grant a continuance of the scheduled hearing if the respondent, prior to the time at which the hearing was scheduled, as indicated on the notice served on the respondent under section 2737.04 of the Revised Code, establishes a reasonable justification for his failure to request the hearing within the prescribed time. If the court grants such a continuance of the hearing, it

shall cause the matter to be set for hearing as soon as practicable thereafter. The continued hearing shall be conducted in accordance with section 2737.07 of the Revised Code.

(C) The court shall not issue an order of possession without a hearing pursuant to division (A) of this section if it grants a continuance of the scheduled hearing pursuant to division (B) of this section.

§ 2737.07 [Time and scope of hearing; issuance of order; notice of hearings and trial.]

(A) Upon the filing of the motion for an order of possession pursuant to section 2737.03 of the Revised Code, the court shall cause the matter to be set for hearing within twenty days thereafter and the respondent shall be notified in accordance with section 2737.05 of the Revised Code.

(B) If a hearing is requested in accordance with section 2737.04 of the Revised Code or if a continuance is granted in accordance with division (B) of section 2737.06 of the Revised Code, the hearing shall be limited to a consideration of whether there is probable cause to support the motion.

The court shall issue an order of possession if it finds, on the basis of

the affidavit and, if applicable, the evidence presented at the hearing, that there is probable cause to support the motion.

(C) Any failure of the respondent to oppose the motion or to refute any evidence presented by the movant shall not constitute a waiver of any defense of the respondent or affect the respondent's right to produce evidence at subsequent hearings or at the trial of the action.

(D) The respondent shall be sent prior notice of the date, time, place, and purpose of any hearing other than the hearing set under division (A) of this section and of the date, time, and place of the trial of the action.

§ 2737.19 [Order of possession without notice or hearing; notice to respondent; request for hearing form.]

(A) Upon the filing of a motion for an order of possession, the court may issue an order of possession without issuing notice to the respondent and without conducting a hearing if the court finds that there is probable cause to support the motion and that the movant will suffer irreparable injury if the order is delayed until the respondent has been given the opportunity for a hearing. The court's findings shall be based upon the motion and affidavit filed pursuant to section 2737.03 of the Revised Code and any other relevant evidence that it may wish to consider.

(B) A finding by the court that the movant will suffer irreparable

injury may be made only if the court finds the existence of either of the following circumstances:

(1) There is present danger that the property will be immediately disposed of, concealed, or placed beyond the jurisdiction of the court;

(2) The value of the property will be impaired substantially if the issuance of an order of possession is delayed.

(C)(1) Upon the issuance by a court of an order of possession without notice and hearing pursuant to this section, the movant shall file the order with the clerk of the court, together with a praecipe instructing the clerk to issue to the respondent a copy of the motion, affidavit, and order of possession, and a notice that an order of possession was issued and

that the respondent has a right to a hearing on the matter. The clerk then immediately shall serve upon the respondent, in the manner provided by the Rules of Civil Procedure for service of process, a copy of the complaint and summons, if not previously served, a copy of the motion, affidavit, and order of replevin, and the following notice:

"(Name and Address of the Court)

(Case Caption)

Case No._____

NOTICE

You are hereby notified that this court has issued an order in the above case in favor of (name and address of movant), the movant in this proceeding, directing that (describe property), now in your possession, be taken from you. This order was issued on the basis of

the movant's claim against you as indicated in the documents that are enclosed with this notice.

If you dispute the movant's claim and believe that you are entitled to possession of the property, you may request a hearing before this court by disputing the claim in the request for hearing form, appearing below, or in a substantially similar form, and delivering the request for hearing to this court at the above address, at the office of (title of court official), no later than the end of the fifth business day after you receive this notice. You may state your reasons for disputing the claim in the space provided on the form, however, you are not required to do so. If you do state your reasons for disputing the claim, you are not prohibited from stating any

other reasons at the hearing, and if you do not state your reasons, it will not be held against you by the court and you can state your reasons at the hearing. If you request a hearing, it will be held within three business days after delivery of your request for hearing and notice of the date, time, and place of the hearing will be sent to you.

You may avoid a hearing but recover and retain possession of the property until the entry of final judgment in the action by filing with the court, at the office of (title of court official), not later than the end of the fifth business day after you receive this notice a bond executed by an acceptable surety in the amount of $_____.

If you do not request a hearing or

file a bond before the end of the fifth business day after you receive this notice, possession of the property will be withheld from you during the pendency of the action. Notice of the dates, times, places, and purposes of any subsequent hearings and of the date, time and place of the trial of the action will be sent to you.

_____

Clerk of Court

_____

Date"

(2) Along with the notice required by division (C)(1) of this section, the clerk of the court also shall deliver to the respondent a request for hearing form together with a postage paid, self-addressed envelope or a request for hearing form on a postage paid, self-addressed post-card in

substantially the following form:

"(Name and Address of Court)

Case Number_____

Date_____

REQUEST FOR HEARING

I dispute the claim for possession of property in the above case and request that a hearing in this matter be held within three business days after delivery of this request to the court.

I dispute the claim for the following reasons:_____

_____

_____

(Optional)_____

_____
(Name of Respondent)

_____
(Signature)

(Date)

WARNING: IF YOU DO NOT DELIVER THIS REQUEST FOR HEARING OR A REQUEST IN A SUBSTANTIALLY SIMILAR FORM TO THE OFFICE OF THE (TITLE OF COURT OFFICIAL) OF THIS COURT WITHIN FIVE (5) BUSINESS DAYS OF YOUR RECEIPT OF IT, YOU WAIVE YOUR RIGHT TO A HEARING AND POSSESSION OF THE PROPERTY WILL BE WITHHELD FROM YOU DURING THE PENDENCY OF THE ACTION."

(D) The respondent may receive a hearing in accordance with section 2737.07 of the Revised Code by delivering a written request for hearing to the court within five business days after receipt of the notice provided pursuant to division (C) of this section. The request may set forth the respondent's reasons for disputing the movant's claim for

possession of property. However, neither the respondent's inclusion of nor his failure to include such reasons upon the request constitutes a waiver of any defense or affects the respondent's right to produce any evidence at any hearing or at the trial of the action. If the request is made by the respondent, the court shall schedule a hearing within three business days after the request is made, send notice to the parties of the date, time, and place of the hearing, and hold the hearing accordingly.

(E) If, after hearing, the court finds that there is not probable cause to support the motion, it shall order that the property be redelivered to the respondent without the condition of bond.

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ALEXANDER L. STEVAS
CLERK

No. 83-1255

In The

Supreme Court of the United States

October Term, 1983

STEPHEN J. HACKER,

Petitioner,

vs.

THE FIFTH THIRD BANK,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the District Court violated Petitioner's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution when Petitioner received prior notice of the Receivership hearing on the day it was to be heard, Petitioner's counsel was present at that hearing, and Petitioner was afforded the opportunity at that hearing to present additional evidence on a later date at his request.

2. Whether the remedy of receivership was appropriate in this case, regardless of whether the courts below applied federal law or state law, when there was ample evidence to support the District Court's finding that Respondent's collateral was in danger of being lost, removed, or materially injured and that Respondent would be irreparably harmed unless a receiver was appointed.

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No. 83-1255

In The

Supreme Court of the United States

October Term, 1983

STEPHEN J. HACKER,

Petitioner,

vs.

THE FIFTH THIRD BANK,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Fifth Third Bank, Respondent herein, prays that the writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-mentioned case on November 29, 1983, be denied.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio was announced from the bench and is appended to this Brief in the Appendix. (App. 11)

The opinion of the United States Court of Appeals of the Sixth Circuit in Fifth Third Bank v. Stephen J. Hacker and SJH Enterprises, Inc. is unreported but is printed in Appendix A hereto, infra, at App. 1.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the United States Constitution and the Ohio Revised Code are involved in the questions presented:

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes:

Ohio Revised Code §2715.01. (App. 56-58)

Ohio Revised Code §2735. (App. 58-59)

Ohio Revised Code §2735.01(A). (App. 58-59)

Ohio Revised Code §2735.01(F). (App. 58-59)

STATEMENT OF THE CASE

The Petitioner, Stephen J. Hacker, is a resident of Florida. The Respondent, The Fifth Third Bank, is an Ohio corporation located in Cincinnati, Ohio.

On Wednesday, September 21, 1983, Respondent filed a complaint against Petitioner because he was in default under the terms of a promissory note which he executed on February 28, 1983. The outstanding principal balance on the note at that time was $2,345,273.92 plus interest. Petitioner also breached the terms of the security agreement he executed on November 1, 1982 and the extension agreement executed on June 23, 1983. The complaint also alleged a claim for relief against SJH Enterprises, Inc., the guarantor of said note. The complaint contained both a specific and a general request for relief.

Along with the complaint, Respondent filed a motion to appoint a receiver. In support of the motion was the sworn affidavit of George A. Schaefer, Jr., Senior Vice President of Respondent Fifth Third Bank.

The District Court set a hearing on the Respondent's motion for September 22, 1983 at 2:30 P.M. and notified Respondent late in the afternoon on September 21, 1983. Petitioner was notified of the hearing as soon as Respondent's counsel came into the office the next morning at 9:00 A.M., September 22, 1983. Petitioner filed a motion for a continuance which the District Court denied at the hearing.

At the hearing George A. Schaefer, Jr., Senior Vice President and loan officer of Respondent Fifth Third Bank, testified that Petitioner has been in default on the promissory note since May 31, 1983. (App. 25) The testimony and evidence also established that Respondent had a valid security interest in the note and that thirty-five mares were to be the collateral. (App. 24, 25, 26) In addition, thirteen syndicate shares, representing an undivided interest in certain stallions, also served as collateral for the note. (App. 24)

It had been agreed between Petitioner and Respondent at the time the note was executed that Petitioner would send Respondent the original thirty-five certificates of foal registration evidencing the ownership rights in the collateral. (App. 27) The testimony at the hearing also established that Mr. Schaefer had made repeated attempts to obtain from Petitioner the original certificates of registration. (App. 27) Mr. Schaefer testified that, to this day, the Respondent has received only two or three of the thirty-five original certificates. (App. 27,

28) Mr. Schaefer explained that without the certificates, there is a danger of the mares being sold. (App. 28)

The testimony also revealed that Respondent originally had received four or five of the thirty-five certificates. However, pursuant to the extension agreement dated June 23, 1983, Respondent sent two of the certificates to racetracks to accommodate Petitioner, under the condition that the certificates be returned as soon as the races were completed. (App. 27) Petitioner, however, has failed to return the two certificates and at present Respondent has only two or three of the certificates in its possession. (App. 28)

Furthermore, Mr. Schaefer testified that Respondent ascertained through its own investigations that some of the thirty-five horses have disappeared and that Respondent does not know what has happened to the collateral. (App. 27) Testimony also disclosed that several horses had been sold but that Petitioner failed to remit most of those proceeds to Respondent. (App. 26, 29, 31, 38, 39) The evidence also established that Respondent was to receive at least forty thousand dollars ($40,000) from the sale of "Hold Your Peace." (App. 30) However, at the time of the hearing, Respondent had not received any proceeds from that sale. (App. 31) It was further established that Petitioner has been totally uncooperative in trying to reach an amicable settlement. (App. 32)

From the foregoing evidence, the District Court concluded that the collateral was being disposed of, with very minor payments of principal being made on the note. (App. 40) To protect the collateral from further dissipation, the District Court granted Respondent's motion to appoint a receiver. The Court made it clear, however,

at the time of the hearing, that it was perfectly willing to set a subsequent hearing on terminating the receivership, (App. 42) and it wasn't until January 10, 1984, nearly four months later, that Petitioner requested one. (App. 54)

Subsequent to the appointment of a receiver by the District Court, SJH Enterprises, Inc. was dismissed from this action.

On Appeal, the Court of Appeals for the Sixth Circuit, in an unreported opinion, affirmed the decision of the District Court to grant the receivership. (App. 1-6) As for the Petitioner's claim that he didn't receive notice, the Sixth Circuit Court of Appeals ruled that Petitioner did in fact receive notice and his attorney was present at the hearing to represent him. (App. 3) Moreover, the trial judge had informed Petitioner that he would set a subsequent hearing for additional evidence at any time the Petitioner so requested. (App. 4)

The Court of Appeals ruled that the evidence supported the trial judge's finding of irreparable harm unless a received was appointed. (App. 4, 5) The Court observed that it was apparent from the record that the trial judge balanced the equities of the situation before appointing the receiver to administer and protect the property. (App. 5, 6)

Petitioner also claimed that Respondent's complaint was for a money judgment only and that, therefore, prejudgment attachment was his sole form of relief. (App. 5) The Appeals Court ruled that this claim was also without merit since Respondent had a properly perfected security interest in the collateral (App. 5) and that under Ohio law, the appointment of a receiver is an ap-

propriate remedy where the applicant has a right to, interest in, or lien upon the property in question. (App. 5)

The Court of Appeals also observed that, even as of the date of its opinion, Petitioner had yet to act on the trial judge's offer to set a hearing (App. 6) and accordingly affirmed the decision of the District Court. (App. 6)

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

The Writ of Certiorari Should Be Denied in that the Case Does Not Present a Substantial Constitutional Question.

The Sixth Circuit Court of Appeals found that there was ample evidence to support a finding of irreparable harm to Respondent unless a receiver was appointed.

In this regard, the Court of Appeals ruled that Petitioner was afforded adequate notice of the hearing on Respondent's motion to appoint a receiver. Not only was his attorney present at the hearing, who had an opportunity to present evidence on Petitioner's behalf, but the District Court informed Petitioner's counsel that he would set a subsequent hearing for additional evidence at any time Petitioner so requested.

The United States Supreme Court has repeatedly held that where only property rights are involved, mere postponement of judicial inquiry is not a denial of due

process, if the opportunity given for ultimate judicial determination is adequate. *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950); *Phillips v. Commissioner*, 283 U.S. 589 (1931); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974).

In this case, the hearing was not ordered *ex parte*, without prior notice or opportunity for a hearing. On the contrary, Petitioner received prior notice and, furthermore, was represented by counsel at the hearing. However, even if one were to assume that the proceedings were *ex parte*, it is clear that there was no denial of due process under the Fifth Amendment nor under the Fourteenth Amendment since the District Court informed Petitioner's counsel at the hearing that he would be afforded the opportunity to present additional evidence at a later time if he so requested. It was not until nearly four months later that Petitioner made such a request. Since due process of law requires no particular form of procedure as long as there is at some stage an opportunity for a hearing and a judicial determination, this case presents no substantial constitutional question with respect to procedural due process.

II.

The Writ of Certiorari Should Be Denied in that the Decision By the United States District Court and by the United States Court of Appeals for the Sixth Circuit Was Based on State Law, Independent of Any Federal Question.

Petitioner argues that the courts below failed to follow state substantive law in a diversity action as set forth in *Erie Railroad v. Thompkins*, 304 U.S. 64 (1938). Such is not the case, however, for several reasons.

First, in affirming the decision of the District Court, the Sixth Circuit Court of Appeals applied Ohio law in determining whether it was proper to appoint a receiver in this case. The Court of Appeals stated that since Respondent had a properly perfected security interest in the collateral, it was appropriate to appoint a receiver to protect the Respondent's interest in the collateral which secured the note. (App. 5) Under Ohio law, the appointment of a receiver is permitted where the applicant has a right to, interest in, or lien upon the property in question. *Hoiles v. Watson,* 117 Ohio St. 165, 157 N.E. 557 (1927). Respondent clearly satisfied this requirement by virtue of its properly perfected security interest in the collateral. By applying Ohio law, the Court of Appeals implicitly determined that Respondent could proceed under the receivership statutes in Ohio Revs. Code §2735.

Second, Petitioner's premise upon which each of his arguments is based is misplaced. This is not a case of pre-judgment attachment under Ohio Revs. Code §2715 but rather one brought pursuant to the Ohio receivership statutes under §2735. The District Court determined from the evidence presented at the hearing on September 22, 1983 that the collateral was being disposed of (App. 40) and that at the most, only minor payments from the proceeds had been applied to the note. (App. 40) Under Ohio Revs. Code §2735.01 (A), a receiver may be appointed on the application of a party who has a probable right to or interest in the property, fund, or proceeds and "when it is shown that the property or fund is in danger of being lost, removed, or materially injured." The District Court appointed the receiver in

order to protect the collateral rather than to apply that collateral to payment of a debt. (App. 20, 22) In fact, the District Court stated that the received would serve as protection not only for Respondent, but for Petitioner as well. (App. 20, 40)

The Court of Appeals disposed of Petitioner's claim that pre-judgment attachment was Respondent's only form of relief. The Court noted that a receivership was a proper remedy under Ohio law since Respondent was seeking to protect its collateral rather than to subject it to satisfaction of the debt. (App. 5)

Under Ohio law, the appointment of a receiver is proper, not only as outlined above, but "in all other cases in which receivers have been appointed by the usages of equity." Ohio Revs. Code § 2735.01(F). This boiler-plate language refers to the broad equity power of a court to appoint a receiver in order to protect property. *Hoiles v. Watson,* 117 Ohio St. 165, 157 N.E. 557 (1927). The Court of Appeals, in affirming the District Court, observed that the District Court balanced the equities in determining whether a receiver should be appointed. (App. 5) This balancing is required by necessity in any receivership proceeding as dictated both by Ohio case law and by the Ohio receivership statute § 2735.01.

In affirming the District Court, the Court of Appeals expressly applied federal law as well as state law in determining whether a receivership was appropriate in this case. The settled rule is that where the judgment of a court rested upon two grounds, one of which is federal and the other which is non-federal, the jurisdiction of the Supreme Court fails if the non-federal ground is adequate to support the judgment. *Fox Film Corp. v. Miller,*

296 U.S. 207, 210 (1935); *Jankovich v. Toll Road Commission*, 379 U.S. 487 (1965); *Edelman v. California*, 344 U.S. 357 (1953). This principle applies not only in cases involving state substantive grounds . . . but also in cases involving state procedural grounds. *Henry v. Mississippi*, 379 U.S. 443, 446 (1965).

Under federal law, the appointment of a receiver is within the sound equitable discretion of the trial court *Guy v. Citizens Fidelity Bank and Trust*, 429 F.2d 828, 833-834 (6th Cir. 1970); *Tennessee Public Co. v. Carpenter*, 100 F.2d 728 (6th Cir.), *cert. denied*, 306 U.S. 659 (1938); *Granader v. Public Bank*, 417 F.2d 75 (6th Cir.), *cert. denied*, 397 U.S. 1065 (1970). Under Ohio law, the standard is virtually identical since a receiver may be appointed not only when the property is in danger of being disposed of but also in all other cases in which equity has dictated that a receiver be appointed. Ohio Revs. Code §2735.01 (A) and (F). Balancing the equities necessarily involves discretion by a court. That discretion was properly exercised in this case, with the result being the same regardless of whether federal or state law is applied. Significantly, Petitioner's arguments before this Court are based upon Ohio law and as such, should not be heard. The Supreme Court must continually refuse "to decide a federal question in a case that might be controlled by a state ground of decision." *Bell v. Maryland*, 378 U.S. 226, 237 (1964).

In the present case, the Sixth Circuit Court of Appeals determined that the evidence supported a finding that Respondent's collateral was in danger of being disposed of and that Respondent would suffer irreparable injury if the receiver were not appointed. The granting

of a writ of certiorari is "not . . . warranted merely to review the evidence or inference drawn from it." *General Talking Pictures v. Western Electric*, 304 U.S. 175, 178 (1938). Additionally, the Court of Appeals ruled that the District Court did not abuse its discretion in appointing a receiver in that under State law the Respondent made the requisite showing of an interest in the subject property and that that property was in danger of being lost or removed. As such, the decision below is adequately grounded in state law and therefore is not cognizable in a writ of certiorari.

CONCLUSION

WHEREFORE, Respondent asks that this Court deny the writ of certiorari.

Respectfully submitted,

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Attorney for Respondent

Office - Supreme Court, U.S.
FILED
MAR 23 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1255

In The

Supreme Court of the United States

October Term, 1983

STEPHEN J. HACKER,

Petitioner,

vs.

THE FIFTH THIRD BANK,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX FOR BRIEF IN OPPOSITION

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APPENDIX A

83-3667

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FIFTH THIRD BANK,

Plaintiff-Appellee,

v.

STEPHEN J. HACKER,
SJH Enterprises, Inc.

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

(Filed November 29, 1983)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. Sixth Circuit Rule 24 limits citation to specific situation. Please see Rule 24 before citing in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the court. This notice is to be *prominently* displayed if this decision is reproduced.

BEFORE: KEITH and KENNEDY,
Circuit Judges, and Gibson*

PER CURIAM. Defendants-Appellants Stephen Hacker and SJH Enterprises appeal from a district court's order which appointed a receiver to administer and protect certain collateral.

On September 21, 1983, plaintiff Fifth Third Bank filed a complaint against defendant because he was in default under the terms of his secured promissory note

---

*Honorable Floyd R. Gibson, Senior Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

executed on February 28, 1983. The complaint also alleged an action against SJH Enterprises as guarantor of the note.

Along with the complaint, the Bank filed a motion to appoint a receiver to protect certain collateral which the bank feared was in jeopardy of dissipation. The defendant was notified of the hearing on the morning it was to be heard. The defendant's attorney made a motion for a continuance because the defendant was in Texas and unable to attend. The trial court denied the motion and the hearing proceeded with defendant's attorney in attendance.

The Senior Vice President of the Bank, George Schaefer, testified at the hearing that the defendant had been in default of the note since May 31, 1983. The outstanding principal balance on the note was $2,345,273. The Bank submitted evidence that twenty-five mares were to serve as collateral for the note, as were thirteen syndicate shares which represented breeding rights to certain stallions. Mr. Schaefer testified that the Bank was to receive twenty-five certificates of foal registration which represented ownership rights in the collateral. However, the Bank currently possessed only two to three of the original certificates. Without the certificates, the collateral could be sold.

Although the Bank had originally received four or five of the certificates, it had temporarily returned several of these certificates at defendant's request in order to allow defendant to race the horses. After the races were over, however, the defendant failed to return all the certificates despite the Bank's repeated request for him

to do so. The Bank also alleged that through its investigations, it discovered that some of the mares had disappeared; their whereabouts unknown. Also, several of the mares: "Pretty Sunny", "Jaka's Lady" and "Hold Your Piece" [sic] had been sold, but defendant rarely remit-(ted) the proceeds.

In the case of "Hold Your Peace", the Bank was to receive at least $40,000 from the sale but has yet to receive any of this amount. The district court, in light of the aforementioned evidence, concluded the collateral was being disposed of with only minor payments remitted to the bank, and therefore a receivership was appropriate. We affirm.

The appointment of a receiver is within the sound discretion of the trial judge. *Guy v. Citizens Fidelity Bank and Trust,* 429 F.2d 828, 833-834 (6th Cir. 1970).

Defendant's first claim that the trial judge abused his discretion by appointing a receiver without providing adequate notice and opportunity to be heard, is unpersuasive.

The defendant in fact received notice and his attorney was present at the hearing to represent him. Although the Bank's motion was scheduled for hearing only a day after it was filed and defendant was not notified until the morning it was heard, there would appear to be no basis to defendant's claim that the Bank deliberately failed to notify him of the hearing. True, the defendant was not present at the hearing, but he was represented by his attorney who had an opportunity to present evidence on the defendant's behalf.

Moreover, the trial judge informed the defendant that he would set a subsequent hearing for additional evidence at any time the defendant so requested.

Even if one were to assume that the brevity of notice substantially deprived defendant of notice and opportunity to be heard, courts have held that where there is a showing of irreparable injury, prior notice and a hearing may be postponed. *Granader v. Public Bank,* 417 F.2d 75 (6th Cir. (1969), *cert. denied,* 397 U.S. 1065 (1970); *Tennessee Public Co. v. Carpenter,* 100 F.2d 728 (6th Cir.), *cert. denied,* 306 U.S. 659 (1938).

The trial judge found that the Bank would incur irreparable injury if the receiver were not appointed. This finding appears sound. Defendant had been in default of his note and security agreement since May 31, 1983.

The Bank discovered that the "seasons" or breeding rights in the stallions which served as collateral recently had been sold. It was the Bank's understanding that defendant would receive Three Hundred Thousand ($300,000) Dollars for these "seasons" sometime during the month of September.

Also, the Bank had only two or three of the certificates of ownership. Without the certificates the Bank had no way of preventing the sale of the mares. The Bank's officer testified that some of the mares had disappeared, and the Bank did not known [sic] their whereabouts, and had not received any of the proceeds. Finally, the Bank testified that defendant had been uncooperative in his dealings with the Bank and had failed to tender the certificates of ownership despite repeated requests.

This evidence supports the trial judge's finding of irreparable harm.

Defendant's second claim is that plaintiff's complaint is for a money judgment only and therefore pre-judgment attachment is his sole form of relief. This claim is also without merit. The Bank had a properly perfected security interest in the collateral. The appointment of a receiver is permitted where the applicant has a right to, interest in, or lien upon the property in question. *Hoiles v. Watson*, 117 Ohio St. 165, 157 N.E. 557 (1927). Therefore, it was appropriate to appoint a receiver to protect the Bank's interest in the collateral which secured the note.

The defendant also takes issues with a statement made by the trial court which allegedly indicated that a "guess work standard" was used to determine whether a receiver should be appointed. The trial judge, in explaining why it was necessary to appoint a receiver stated:

> "So there be no question. I will hear from you in detail, but observe, I can be wrong either way. I can be wrong by appointing a receiver where one isn't necessary, or I can be wrong in not appointing where one is necessary. If I guess wrong in that fashion, I can destroy the collateral security of the lender. It seems to me that if I must make a choice, as to which way to err, I'm better off to err in protecting this collateral, rather than not protect it."

This Court does not object to the trial court's language. Placed in its proper context, it is obvious that the judge's statement was in reference to the balancing of equities that must take place before a receiver is appointed to administer and protect property. Moreover, the trial

court made it clear that at any time the defendant had additional evidence on the appropriateness of a receiver, he would schedule a hearing to consider this evidence. Although the defendant has filed a number of motions in the trial court, he has yet to act on the judge's offer to set a hearing.

Accordingly, the order of the Honorable Carl B. Rubin of the United States District Court for the Southern District of Ohio, Western Division, is affirmed.

APPENDIX B

Case No. C-1-83-1547

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FIFTH THIRD BANK,

Plaintiff

v.

STEPHEN J. HACKER, et al.,

Defendants

(Judge Rubin)

ORDER APPOINTING RECEIVER

(Filed September 26, 1983)

This matter came on for hearing on the Motion of Fifth Third Bank for the Appointment of a Receiver on September 22, 1983 at 2:30 P.M. in the United States District Court in Cincinnati, Ohio before Judge Carl Rubin. The Court having reviewed the Motion and hearing the testimony of George A. Schaefer, Senior Vice President of the Fifth Third Bank, finds that the Motion for Appointment of the Receiver is well taken and does hereby grant same.

It is therefore ORDERED THAT:

Robert O. Edington,
Attorney at Law
1650 Atrium One,
201 East Fourth Street
Cincinnati, Ohio 45202

is appointed Receiver of the property interests of Stephen J. Hacker in certain thoroughbred horses, listed in Exhibits "A" and "B" attached to this Order. The Receiver has the authority to preserve, protect, and collect all the horses, certificates evidencing ownership of the horses or undivided fractional ownership shares in the horses listed in Exhibits "A" and "B" attached to this Order and young of the horses, and the products and proceeds of the horses.

The Receiver is specifically authorized to collect all monies held by any party arising from the sale, racing, sale of breeding seasons or otherwise directly or indirectly related to the horses listed on Exhibits "A" and "B" attached.

It is further ORDERED that Robert O. Edington shall post a bond of $100,000 with this Court.

/S/ Carl B. Rubin
JUDGE CARL B. RUBIN

/S/ LOUISE M. ROSELLE
REISENFELD & ASSOCIATES

By: Louise M. Roselle
Attorney for Plaintiff
Auburn Barrister House
2355 Auburn Avenue
Cincinnati, Ohio 45219
(513) 381-6810

FREDERICK J. McGAVRAN
Attorney for Defendant
2500 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202

EXHIBIT "A"

Steve's Jewel
'81 Joachim/Steve's Jewel Filly
Pretty Sunny
'82 Codex/Pretty Sunny Filly
Jaka's Lady
'82 Diamonds Are Trump/Jaka's Lady Colt
Smile Pretty
Distortion
'81 New Prospect/Smile Pretty Filly
'82 Vagaries/Smile Pretty Filly
Coin Prospector
Born to Reason
Continental Suit
Kissonthewips
Hack's Flash
Vitus Dancer
New Ripple
'81 Distinctive/New Ripple Filly
'82 Diamonds are Trump/New Ripple Colt
March Pane
'82 Riverman/March Pane Colt
Balsane
'82 State Dinner/Balsane Filly
Hemostat
First Sea Lord
'81 Stage Door Johnny/Chimmy Filly
Hill Daisy
Scott's Babe
Fey
Bubbly Beginning
Treasury Dip
Come Up Pence
Zulu Fire
'81 North Sea/Zulu Fire Filly

EXHIBIT "B"

NAME SYNDICATE	NUMBER SHARES	VALUE
DIAMONDS ARE TRUMP	4	$ 76,000.00
HOLD YOUR PEACE	1	$ 55,000.00
VAGARIES	1	$ 16,000.00
RIVERMAN	1	$500,000.00
PLUGGED NICKLE	1	$275,000.00
TRUE COLORS	1	$ 25,000.00
STATE DINNER	1	$200,000.00
CODEX	1	$155,000.00
MUSCOVITE	1	$ 75,000.00
ARGUMENT	1	$150,000.00

APPENDIX C

C-1-83-1547

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FIFTH THIRD BANK,

Plaintiff,

vs.

STEPHEN J. HACKER, *et al.*,

Defendant.

Before:

The Honorable Carl B. Rubin
Chief Judge
Cincinnati, Ohio

HEARING ON MOTION TO APPOINT RECEIVER
SEPTEMBER 22, 1983
IN CHAMBERS CONFERENCE
SEPTEMBER 23, 1983

APPEARANCES:
ON BEHALF OF THE PLAINTIFF:
Sylvan Reisenfeld, Esq.
Louise Roselle, Esq.
George Schaefer

ON BEHALF OF THE DEFENDANT:
Frederick McGavran, Esq.

Linda M. Kuppin,
Official Court Reporter

**CIMMARON Computer-Aided
Transcription**

THURSDAY AFTERNOON SESSION

SEPTEMBER 22, 1983

PROCEEDINGS

BEFORE THE COURT:

The Court: This is the matter of Fifth Third Bank versus Stephen Hacker, 83-1547.

It's my understanding that the plaintiff is seeking the appointment of a receiver.

Mr. Reisenfeld, can you tell me something about this case?

Mr. Reisenfeld: If I may, if it please the court, this action arises out of a promissory note that was executed by the defendant on November first, and a statement Mr. Hacker executed in favor of the bank, a security agreement, which, in fact, contained a list of thoroughbred horses and various by-products that come from these horses.

In toto—

The Court: Excuse me. That's an odd statement. The ability to sell shares in mating mares?

Mr. Reisenfeld: Yes, and what is known as seasons. Whenever you have shares of thoroughbreds with syndications involved, there are certain seasons involved.

The Court: As I understand it, a share entitles you to nominate a mare, depending on the number of shares. Are these horses all stallions?

Mr. Reisenfeld: All stallions and mares. We had thirty-five separate mares that were listed on the se-

curity agreement, which has caused a great deal of problems and the reason that we are here today, as well, if Your Honor please.

Throughout the time from November first until the time that his loan became in default, which was in May of 1983, the bank has worked diligently, through Mr. Hacker's counsel, and through its own counsel to try to achieve some sort of a work out of the problem. There is, as you will note in the suit filed in this case, a total due and owing the bank of two million three hundred thousand dollars plus.

The matter has been in default since May, and in June of 1983, again, through the intervention of counsel, Mr. Wachs, who is a member of the law firm representing Mr. Hacker today, a new letter of agreement, a new letter of intent was put into effect, whereby, Mr. Hacker had agreed to, in an orderly fashion, allow the bank to start selling some of the collateral.

The bank at that time found out that, of those horses listed in the security agreement, a number of them had already been sold in January of 1983.

The security agreement specifically called for a security interest in the proceeds of the collateral as well as the collateral itself.

I want Your Honor to know that there had been a few payments, all interest, from the time of the June 23rd attempted work out until the present time, there was a total of, I believe, about $142,000 paid all to interest to take care of the past due interest.

What facilitated the bringing of the action yesterday and the motion for receivership was primarily a finding by

the bank that the seasons that were involved were, in fact, sold by Mr. Hacker, a short period ago, and it is the understanding of the bank that he is to receive approximately three hundred thousand dollars in cash for those seasons and it is our belief that that money will be due to him sometime during the month of September of 1983.

It is also a problem in that on two specific occasions, Mr. Hacker asked the bank for permission to and for its cooperation in sending certain syndication shares and certain certificates of ownership to two racetracks in the United States. One at Arlington, and one, I believe, at Belmont, for two specific racehorses, the problem being that, unless the racetracks receive these certificates, these horses are not permitted to run at the tracks.

In good faith, the bank did, in fact, send the certificates to the respective racetracks, and now, once we have reached a position where we have no cooperation whatsoever from Mr. Hacker in trying to achieve the work out that was entered into on June 23, 1983, we find that the racetracks will not send back the certificates, because they are, as they feel, caught in a very awkward position. They are serving two masters as such. Mr. Hacker, who is saying, "Don't return them." At least that's what our understanding is, and the bank saying, "We sent them to you in good faith, now return them."

We believe that, in that respect, a receiver is necessary to at least have a court order and some portfolio, if you will, to go to these racetracks and collect back the certificates that belong to the bank.

The Court: What effect do these certificates have if they remain outstanding?

Mr. Reisenfeld: Without the certificates the bank has no control of its collateral; without the certificates the bank has no ability to sell any of its collateral.

The Court: Okay. These certificates release a right in these horses?

Mr. Reisenfeld: The certificates is, in fact, very much like a certificate of title to an automobile. It is the certificate of ownership for the particular interest in either the stallion or the mare or thoroughbred or whatever the case may be.

The Court: Mr. Reisenfeld, I have only a very general knowledge. I would not want it thought that I'm that familiar with racetracks, but I'm aware of something called a claiming race. I assume that what you are suggesting is that it would be possible to put these horses into a claiming race and someone else claim them, and, thereby, obtain good title.

Mr. Reisenfeld: Judge, I would think so. I will be perfectly honest with you. I'm not sure of the answer but I do have a witness present today who is an expert in that area and who is ready, willing and able to testify in regard to those type of questions. I do not profess either to be an expert in this area. But I would suspect you are correct.

The Court: The reality at this point is that there is collateral security for this loan and the collateral might be in some danger.

Mr. Reisenfeld: We think it is in imminent, total danger, yes, your Honor. We would indicate to the court that we know that the general rule, and I'm sure Mr. Mc-

Gavran is going to argue that the notice issue is a problem. We just filed this yesterday afternoon and, quite frankly, we just gave notice early this morning, first thing this morning to Mr. Wachs that this motion of receivership was filed, but we believe that there is a great amount of authority where the court can appoint a receiver, without the notice requirement, both Sixth Circuit cases, as well as Ohio cases, and we believe, in that accord, that it's important that we have the protection that we seek in this matter today.

The Court: Mr. Reisenfeld, I'm aware of an axiom that I thought that bankers followed. "Never invest in anything that eats." I'm mildly curious, is it customary for banks to lend money on racehorses?

Mr. Reisenfeld: Again, Your Honor, I have Mr. Schaefer here today who is Senior Vice President of Fifth Third Bank. I think he would be better qualified to answer that.

The Court: It really doesn't matter. I was just mildly curious. This isn't what you would ordinarily expect a bank to lend money on.

Mr. Reisenfeld: Sometimes it's the only thing that is available in collateral and sometimes that's better than nothing, and I suppose that might have been the case in this situation.

The Court: Mr. McGavran, I will hear from you.

Mr. McGavran: Your Honor, please, counsel, Your Honor, we were notified, as Mr. Reisenfeld said, of the complaint and the motion and the hearing about nine

o'clock this morning. I filed a motion for a continuance, stating —

The Court: Which I am denying, Mr. McGavran. So there be no question. I will hear from you in detail, but observe, I can be wrong either way. I can be wrong by appointing a receiver where one isn't necessary, or I can be wrong in not appointing one where one is necessary. If I guess wrong in that fashion, I can destroy the collateral security of the lender. It seems to me that if I must make a choice, as to which way to err, I'm better off to err in protecting this collateral, rather than not protect it.

While I recognize, this is very short notice, and I'm perfectly willing to set a subsequent hearing, I really have some concern about what has been expressed. Are these facts essentially correct?

Mr. McGavran: Let me say several things, if I may, Your Honor. I understand the court has denied my motion. If I may just make one observation, and that is, if the court does appoint a receiver, and it turns out at a subsequent time that the appointment was incorrect, the effect of appointing a receiver on assets of any businessman has tremendous consequences that can go far beyond the scope of the action, and —

The Court: For the value of a racehorse as distinguished from physical assets of the company is something entirely different. The value of a racehorse, I would assume, is on its speed, and in the case of the stallions, their bloodlines for purposes of stud. I can't see how either of these things are affected by the appointment of a receiver.

Mr. McGavran: I didn't make myself clear. A businessman has a receiver appointed for certain of his as-

sets. I am not familiar with Mr. Hacker's businesses. I don't know what his credit agreements are. I believe that in some credit agreements, it may well be a provision that an appointment of a receiver will be an event of default under agreements other than those with the Fifth Third Bank.

I am simply suggesting to Your Honor that the consequences of what is done in appointing or not appointing a receiver may be tremendous and be tremendously detrimental to Mr. Hacker and his business. I cannot stand here and point to the chapter and verse of Mr. Hacker's affairs, because I got into this this morning and I don't know. I'm stating that the consequences to my client may be every bit as tremendous as they may be to the Fifth Third Bank.

I also would say to the court that this complaint and this motion and this affidavit didn't tell me what Mr. Reisenfeld just said. That cannot be abstracted from a conclusory allegation in this affidavit or in this motion, which I do not know, standing before the court, under what section of Ohio law we are proceeding. I don't know from these papers whether we are going under 2735.01, I don't know if this has something to do with fraudulent conveyances under Chapter 1356 and 7 or 1336. I don't know whether we are after a pre-judgment attachment in 2715.

The Court: Let's leave it at this, Mr. McGavran. I don't think that's too significant. I think the sole question here is one that's addressed to traditional equity powers. Here is a lender with collateral security that's in danger and there is some basis, from what Mr. Reisenfeld has said, of what has already occurred, that would place this lender collateral in danger. All these things are somewhat

ephemeral. They may occur; they may not occur. But here is a practical situation. Your client, unless you are prepared to rebut this, accepted some money that should have gone to the bank and didn't remit it.

He has sold horses that are listed on this collateral. He has reduced the security, or at least at this particular point, there is an appearance that that's been done. Isn't that where the equity powers of a court are traditionally invoked?

Mr. McGavran: Well, Your Honor, the equity power is an extraordinary power.

The Court: Equity itself is extraordinary. Theres' no legal remedy, that's correct.

Mr. McGavran: What we have here is by this motion, what should be an action on a note and an action — action to foreclose on security has been expanded by the motion into an action to appoint a receiver. That's where we are, and the court asked me, did he sell the horses and not give them money? I don't have Mr. Hacker here. I can't stand here and for him to say whether that happened or it didn't. At best as I know, if horses were sold, the proceeds were expended with the knowledge and the consent of the bank for the preservation of the collateral. I'm in a position of contradicting witnesses without having my client here, and —

The Court: This happens with great frequency, when there is extraordinary relief sought, Mr. McGavran. But the relief itself can be destroyed by delay. The only thing—I liken this to a temporary restraining order. A protection of collateral, simply, everybody stop what you

are doing right now. The court will take jurisdiction and now you want a hearing to dissolve the receivership, I'm available, but at this precise moment, it seems to me that, as a matter of caution, for everybody's protection, this collateral ought to be protected. Apparently, the loan is in default. I don't know what the situation will develop on that, but I simply feel that this isn't as though it's a mortgage on a building that isn't going to move. Horses can be moved. Do you know where these horses are located?

Mr. McGavran: I know where some of them are located.

The Court: Where?

Mr. McGavran: They are located in Florida, I believe one or two are in Chicago and I believe in New York.

The Court: Anything further, Mr. McGavran?

Mr. McGavran: In summarizing what I believe the evidence would be, there will be a dispute as to what horses were covered by the security agreement.

The Court: It could take us months to sort that out, couldn't it?

Mr. McGavran: I really can't answer that, Your Honor.

The Court: How would you—forgive me for using that phrase, but it's been my experience that any time something as complicated as involving two million dollars is concerned, it isn't going to be straightforward. It's going to take a long time to sort things out, and if the allegation is which horses were covered and which were

not and when were they covered, that's all the more reason, it seems to me, to make sure we preserve everything so nothing further happens.

Mr. McGavran: Secondly, I would say that any disposition of the assets that has happened, has been, I'm repeating myself, was done with the knowledge and consent of the bank. I would pick up on a statement that Mr. Reisenfeld made, the filing of this suit came out of the blue while negotiations with my partner, Jim Wachs, were in progress. It would seem to me that as a result of a phone conservation we had with Mr. Hacker this morning that much of this matter could be taken—could be disposed of by a negotiation among counsel rather than by order of the court, and having said that, if the court is going to proceed, I would need, I did not ask Mr. Wachs to come over. He was involved in a meeting all day that had been previously set. If I may have your permission to have perhaps a five minute break, I would like to have him over here, because he's been involved in the negotiations and in lieu—

The Court: Mr. McGavran, I'm not willing to prolong this. I do not propose to hear evidence. I propose instead to set this down for a full hearing at a time that is convenient, but, likewise, to appoint a receiver right now, and make sure that this is retained in its present status.

It may well be that you can establish that this has been done wrongfully or maliciously, and your client may have a substantial damage suit against the Fifth Third Bank for proceeding in this fashion, and for misleading the court and for causing him great damage. You know,

that right is always preserved to him. But I'm faced at this point with the opportunity to make a mistake, either way. It seems to me that the remedies that are available are such that if I must make a mistake, I better make a mistake in protecting this collateral rather than to let it alone.

If you wish a time for a hearing, if you want to conduct any discovery in the meantime, I'm sure we can accommodate you.

Mr. McGavran: If I heard Your Honor correctly, the court is going to appoint a receiver.

The Court: Yes.

Mr. McGavran: Without hearing evidence?

The Court: That's correct. At this particular point, today, I'm going to appoint a receiver, simply to keep this matter in status quo.

Mr. McGavran: May I make two points, Your Honor?

The Court: Sure.

Mr. McGavran: The first, with respect, I must assert my client's objection to the appointment of a receiver on nothing more than a conclusory affidavit and statement of counsel.

The Court: Alright. I will hear the testimony of the gentleman from the Fifth Third Bank and you may interrogate. Mr. Reisenfeld, you may proceed.

Mr. Reisenfeld: If Your Honor please, we'll call Mr. George Schaefer.

GEORGE A. SCHAEFER, JR., the witness, having been duly cautioned and worn, testified under oath as follows:

Direct Examination

By Mr. Reisenfeld:

Q. For the record, Mr. Schaefer, would you tell the court your name and spell your last name, please?

A. George A. Schaefer, Jr., S-c-h-a-e-f-e-r.

Mr. McGavran: If Your Honor please, Mr. Reisenfeld earlier said there may be another witness in the courtroom. I would move for a separation of all witnesses.

The Court: All persons in this courtroom who will be called upon to testify who are not seated at counsel table are directed to leave the courtroom at this time and remain outside until summoned. You may proceed.

By Mr. Reisenfeld:

Q. By whom are you employed, Mr. Schaefer?

A. The Fifth Third Bank.

Q. In what capacity are you employed there?

A. I'm Senior Vice President and Loan Officer there.

Q. Are you familiar with Stephen J. Hacker?

A. Yes, I am.

Q. Tell the court how you became familiar with Mr. Hacker.

A. Mr. Hacker has been a client of the bank for approximately ten years and I was the loan officer handling his relationship with our bank.

Q. In November of 1982, was there a note and security agreement executed by Mr. Hacker in favor of the bank?

A. Yes, there was.

Q. Approximately what was the amount of money of that particular promissory note?

Mr. McGavran: I object.

The Court: Overruled.

The Witness: The note was approximately two million three hundred and forty-five thousand odd, I believe.

Q. In addition to the note, there was a security agreement?

A. Yes, there was.

Q. What was the collateral for the security agreement

Mr. McGavran: I object.

The Court: Overruled.

The Witness: The collateral was certain stallions syndicate shares and certain mares, certain race horses.

Q. Mr. Schaefer, did you have an opportunity to discuss this particular loan with Mr. Hacker on a number of occasions?

A. Yes, I did.

Q. When did the loan become in default?

A. The loan became —

Mr. McGavran: Object.

The Court: Overruled.

The Witness: The loan became in default on May 31, 1983. That was when the note was due. It was not paid.

Q. Either prior to that time or just after that time, did you have an occasion to go to Florida to visit Mr. Hacker?

A. Yes, I did, at the end of May, I believe it was May 28, I'm not certain of that date, I traveled to Winterpark, Florida to discuss this with Mr. Hacker.

Q. What was the purpose of your going down there?

A. To visit with him face-to-face and sit down and explain the seriousness of the problem and that we needed some action. We were vitally concerned and wanted to get our money paid back to us in accordance with the terms of the note.

Q. The various mares that were listed on the security agreement, do you recall approximately how many mares there were?

A. Originally, there were 35 mares listed on that agreement. I believe it was 35. We have a listing.

Q. What if anything did Mr. Hacker tell you in regard to those mares when he gave them to the bank as collateral?

A. These were given to the bank because the bank expressed an interest that if we were going to continue the relationship, we wished to have collateral. He gave us these as collateral, and indicated that their value was sufficient protection for our note, to the note we had outstanding.

Q. Subsequent to the issuance and execution by Mr. Hacker of the security agreement to the bank listing the 35 mares, what if anything did you find out about the existence of the 35 mares?

A. I don't understand the question.

Q. Did you find out that — did you ever find out that there were less than 35 mares available of those that were listed on the security agreement?

A. Yes, we did.

Q. The ones that were missing, did you ever find out what had happened to them

A. We were given some accounting. Never a detailed accounting. We were given a listing that indicated that—

Mr. McGavran: I want to object. This is hearsay, Your Honor.

The Court: It may well be but you are entitled to interrogate, Mr. McGavran. At this particular point, I've got to make a decision and I'm perfectly satisfied to accept this evidence. Objection overruled. Proceed.

The Witness: We did receive a listing that some of the collateral had been sold. We have got a copy in our file of that list. Other collateral, in effect, disappeared,

we did not know where the collateral, what happened to the collateral.

Q. Do you know where the collateral is today?

A. No, we have made repeated attempts to get the certificates of full registration that we need. We have asked that they be sent to us. We have attempted for the last three and a half months to work with the client in liquidating the collateral and have not been able to. That's why we are here today.

Q. Mr. Schaefer, did you specifically write to Mr. Hacker requesting the certificates for these various horses?

A. On more than three occasions.

Q. What response did you receive on each occasion?

A. It was continual delay. We did receive one or two of the certificates out of the 35, but never received the 35 original, full certificates.

Q. Of the total 35 mares that were listed, how many of those certificates do you have in the bank today?

A. I believe we have only two or three of those today.

Q. Were any of the certificates sent to racetracks in the United States?

A. Yes, I personally sent —

Q. How many?

A. At least two of those, one to Belmont and one to another, I forget the name of the other track in New York. At Mr. Hacker's request.

The Court: Out of the 35, you sent two to racetracks and you have two to three in the bank, you are missing thirty, aren't you?

The Witness: Yes.

The Court: Did you ever have them?

The Witness: No.

The Court: Okay.

By Mr. Reisenfeld.

Q. Now, —

The Witness: If we would have had them, the collateral could not have been sold and that is one of the problems.

By Mr. Reisenfeld:

Q. Now, Mr. Schaefer, are you familiar with the term seasons?

A. Yes, I am.

Q. What is your understanding of what seasons are?

A. The season is the breeding right for the user of the stallions. That's my understanding.

Q. Were you told by Mr. Hacker at the time he executed the security agreement that as part and parcel of your collateral that you would also be receiving seasons?

A. It was our understanding that when we took the collateral, in accordance with the security agreement, that we had the rights to that collateral and the products and proceeds of that collateral. In other words, if we have collateral, Your Honor, that eats, we have the right to the foals and colts.

Q. Were you recently made aware of the fact that Mr. Hacker, in fact, had sold these seasons?

A. Yes, yes, I was.

Q. Did he tell you that?

A. No. We found out through our own investigation.

Q. Were you surprised by that fact?

Mr. McGavran: I object, Your Honor.

The Court: Sustained.

By Mr. Reisenfeld:

Q. Do you know whether or not Mr. Hacker has received the proceeds from those seasons?

A. I do not know whether or not he has received the proceeds. I had a conversation with Mr. Hacker whereby he indicated he was going to receive some proceeds from those sales.

Q. When were those proceeds to be received, during what month?

A. In September of this year.

Q. How much are the proceeds that he's to receive from the seasons?

A. We do not know for certain. It's in the hundreds of thousands of dollars figure.

Q. In June of 1983, did you have a discussion with counsel for Mr. Hacker?

A. Yes, I did.

Q. Was that Mr. Wachs?

A. Yes, it was.

Q. As a result of that discussion, was there a letter of agreement that was entered into between the bank and Mr. Hacker through counsel?

A. Yes, there was.

Q. And what was the basis or what was the premise of that particular agreement in June of 1983?

Mr. McGavran: Your Honor, I object. The document speaks for itself.

The Court: Overruled.

The Witness: The basis of that agreement is that we would work together in order to liquidate the collateral, specifically, that if we found a buyer for a stallion share or a horse, we would present that fact to Mr. Hacker, through Mr. Wachs, for example, on racehorse "Hold Your Piece", [sic] we have an offer for forty thousand dollars. At that point in time, Mr. Hacker had fifteen days to either find a better offer for that, or to give us, to agree with us to go ahead and liquidate the collateral. And that was the agreement for all the horses that we held.

Q. As a result of conversations with Mr. Wachs, were you aware of whether or not Mr. Wachs had possesion of a certificate for "Hold Your Piece" [sic]?

A. I'm now aware that Mr. Wachs had that certificate. He had the papers on "Hold Your Piece", [sic] that stallion syndication.

Q. Was there an agreement that the bank would receive forty thousand dollars, which was the purchase price for the "Hold Your Piece" [sic]?

A. Yes, that was stated by Mr. Wachs and Mr. Hacker to me.

Q. Has the bank received that forty thousand dollars as of today?

A. No, it has not.

Q. Was one of the other stallions involved a stallion called "River Man"?

A. Yes, it was.

Q. Was the bank able to obtain a purchaser for the "River Man"?

A. Yes, we were.

Q. What was the amount of money that the bank was to receive for "River Man"?

A. It was approximately $350,000.

Q. After receiving that particular offer, was the bank advised by counsel, Mr. Hacker's counsel, or Mr. Hacker that there was an offer in excess of the $350,000?

A. Yes, it was. He stated he had a better offer than that.

Q. Have you ever seen anything in writing to that effect?

A. No, we have not. In fact, the original agreement called for fifteen days. We gave Mr. Hacker sixty days to come up with a better offer because it was in his best interest and ours to find more money for our collateral and we tried our best to do it and could not.

Q. Wouldn't the bank be able to sell "River Man" with the present documentation that the bank has?

A. I believe it would, yes.

Q. Does the bank have a certificate for "River Man", to the best of your knowledge?

A. We have a file of ownership papers for "River Man".

Q. Do you know whether or not the prospective owner needed cooperation from Mr. Hacker or requested cooperation from Mr. Hacker?

A. Yes, he did.

Q. Did you discuss that with Mr. Hacker?

A. Yes, we did.

Q. Did you receive whatever cooperation was necessary from Mr. Hacker?

A. No, Mr. Hacker continually stated that he had a better offer and that it was continually forthcoming, which it never occurred.

Q. Was this also true with other stallions?

A. Yes, it was.

Mr. Reisenfeld: You may inquire.

The Court: Mr. McGavran, do you wish to interrogate?

Mr. McGavran: I do, Your Honor. I repeat my request to have a five minute recess while I get Mr. Wachs over here.

The Court: If it wasn't important enough to have Mr. Wachs to be here, I'm not going to take a recess. If you wish to interrogate feel free, if you don't wish to, I don't care.

CROSS-EXAMINATION

By Mr. McGavran:

Q. Did you bring with you, sir, the security agreements and the descriptions of collateral to which you have referred in your testimony?

A. Yes, I believe Mr. Reisenfeld has a copy of those. I do not have a copy on my person.

Mr. McGavran: May I see them, sir? Your Honor, may I hand the clerk a document and ask her to mark it as Defendant's Exhibit 1 for identification, please?

The Clerk: Defendant's Exhibit A, sir.

Mr. McGavran: Thank you.

Q. The clerk has handed you a document marked for identification as Defendant's Exhibit A. Would you identify that, please, if you can?

A. Defendant's Exhibit A is a copy of an affidavit listing the Fifth Third Bank as plaintiff vs. Stephen Hacker and S.J.H. Enterprises, Inc. as defendants.

Q. Do you find attached to that a copy of a certain security agreement that bears the date November 1, 1982?

A. Yes, I do.

Q. Is that the security agreement to which you've been referring in your testimony, sir?

A. That is correct.

Q. Mr. Schaefer, I saw in a reference in the complaint that your bank filed in this action, a reference to another security agreement dated June of 1982. Do you have a copy of that, sir?

A. Not in this packet of information I do not.

Q. Is it in the courtroom someplace so we may see it?

Mr. Reisenfeld: May it please the court, I'm more than willing, I'm looking at the complaint and I don't see any reference to June of 1982. I'd be more than happy to make available to Mr. McGavran whatever we have.

The Court: Was there a second security agreement, was there a previous security agreement?

The Witness: There have been numerous security agreements with Mr. Hacker through the years, yes.

Q. I invite your attention to the exhibits attached to the security agreement.

The Court: Excuse me. Which security agreement?

Mr. McGavran: I'm speaking of the one that is attached to Defendant's Exhibit A, Your Honor.

The Court: November first, 1982 security agreement?

Mr. McGavran: Yes.

Q. Do you find attached to that a document marked Exhibit A?

A. Yes, I do.

Q. Do you find in back of that, Mr. Schaefer, what appears to be a copy of a note with handwriting on the top and then the names of what apparently are four horses; do you have that, sir?

A. I have the copy of Exhibit A marked a note for $2,395,000, is that what you are referring to?

Q. No, I'm asking if in that package of material someplace you have attached documents that were exhibits to the security agreement dated November one, '82?

A. Yes.

Q. Do you have up at the top, it says Exhibit A and says "Steve's Jewel"?

A. Yes.

Q. Could you go to the next page? Do you have what appears to be a copy of the note with handwriting?

A. Yes, a small, not a legal note, but a memo, yes.

Q. My question to you, sir, is were these two documents, the Exhibit A and the handwritten note attached to the November one, '82 security agreement when Mr. Hacker signed it?

A. The Exhibit A was and the Exhibit B was. I'm not certain whether this note was attached to that or not, sir.

Q. Do you know whose handwriting on the note says, "The following four are missing from list"?

A. I'm not certain whose handwriting that is. I believe it may be my secretary's handwriting but I'm not positive. It may be Mr. Hacker's secretary also.

Q. If you look at the Exhibit A list, Mr. Schaefer, you find that the names of the horses on that little note do appear about two-thirds of the way down, don't they, "March Pain", "'82 River Man", "Bell Sane" and "'82 Steak Dinner"?

A. Yes, they do.

Q. Was Exhibit A retyped after receipt of this note that says these following four are missing from list?

A. I'm not certain of that.

Q. Isn't it a fact that the Exhibit A list is different from the Exhibit A list that was attached to the security agreement when Mr. Hacker signed it?

A. No, there may have been, and I'm not certain because I don't have the documents in front of me, previous security agreements in which we held certain horses as collateral.

Q. Well, that wasn't my question, sir. Would you read my question?

(Question read as requested.)

The Witness: No, I do not believe it was.

By Mr. McGavran:

Q. Is the Exhibit A the list of 35 mares to which you referred in your testimony?

A. Yes, but there are approximately 35 on there or 34, or 35.

Q. Looking at this list, if you go to the third one down, "Pretty Sunny", isn't it true that that horse was sold with your knowledge and permission and the proceeds applied to seasons or upkeep for the horses?

A. I do not—please ask that question again.

The Court: Read the question.

(Question read as requested.)

The Witness: We found out that this horse was sold; after it was sold, okay, we did not receive the total proceeds from the sale of this horse.

Q. Well, isn't it true that the proceeds were applied for seasons and for upkeep of the horses?

A. I do not know where the proceeds that we did not receive were applied.

Q. You did receive part of the proceeds?

A. We did receive a portion of the proceeds for interest on the notes.

Q. Looking at the next horse, "82 Codex", you are aware, are you not, that that horse died?

A. Of the list, I'm not intimately familiar with every horse on this list without the files that we have on them. It may have died, yes. We did not receive the insurance proceeds from that.

Q. Have you requested them?

A. Yes.

Q. When?

A. Throughout—from the time the collateral was pledged on at least three occasions, we have written to Mr. Hacker between November of '82 and September of this year, requesting that we have full right and title to all these horses, plus the insurance proceeds. We do have

the insurance on some of those. We do not have them on all of them.

The Court: What is the name of that horse that died?

Mr. McGavran: "'82 Codex".

The Court: Spell it.

Mr. McGavran: '82 C-O-D-E-X.

Q. You have not specifically requested the insurance proceeds of this horse, though, have you?

A. No, I'm not certain that this horse died, as I stated, there was a horse or two that died that we did not receive the insurance proceeds on.

Q. Isn't it true that the next horse, "Jacka's Lady" was sold at an OBS sale with your knowledge and consent?

A. We found out about the sale of this horse after it occurred. Let me state the answer this way. We have continually requested that Mr. Hacker liquidate the collateral and apply it to our note. That has not been done consistently. It has been done partially, extremely rarely, that he has sold them and given us the proceeds. That, I believe, is why we are here today.

Q. You can't testify that you were given none of the proceeds of "Jacka's Lady"?

A. No, we were paid a certain amount of the interest due on our note from the sale of certain of these animals.

The Court: Have you been paid anything on the principal?

The Witness: We have been paid a minor amount on the principal. I believe it is 25 or 50 thousand dollars in the past year and a half.

By Mr. McGavran:

Q. Isn't it true that "Distortion" was sold with your permission?

A. These horses, we have been pleading with Mr. Hacker to sell the horses, okay. We did not find out about the sale 'til after it occurred. We did not receive the direct proceeds from this sale. We did not control the proceeds of the sale.

Q. Well, the fact is, you asked him to sell it and he sold it, right?

A. That's correct.

The Court: Isn't it reasonable that the request to sell also included remission of the proceeds? The collateral security is reduced each time a horse is sold. Wouldn't you expect that then a portion to reduce the debt would likewise occur?

Mr. McGavran: Your Honor, as I said—

The Court: Your questions, Mr. McGavran, I don't quite understand them. The witness has now testified three times that they've asked him to liquidate the collateral, but not just liquidate the collateral, liquidate it and pay off the note.

Mr. McGavran: Your Honor, what we are missing due to, and I must again confess insufficient preparation, is knowledge of the amount of the sale, the value of

the horse, and we concede that what to me are large sums of money were remitted to the bank as interest.

The Court: Yes, but that isn't sufficient, Mr. McGavran. If you have a hundred trucks as collateral for a five million dollar loan and you sell fifty trucks, I don't think you can justify your position by saying, well, we paid the interest. The answer is you've reduced the collateral security by fifty percent but you haven't reduced the note by fifty percent. All I'm receiving from this witness is more and more conviction that there is a purpose to be served in the appointment of a receiver.

Mr. McGavran: Well, I would point out, Your Honor, with all respect, that without knowing the amount of the proceeds from the sale, we simply cannot say whether all or none of the proceeds were remitted and without other evidence, we cannot say that the balance of the proceeds was not applied to the care and feeding of the other collateral. I'm just saying we can't say that.

The Court: The obvious answer is that the debtor is insecure. Collateral is being disposed of and no payments on the note, or very, very minor payments on the note, unless you are prepared to establish that that's incorrect, and Mr. McGavran, all I can tell you is, you are convincing me more and more that there's some reason to appoint a receiver, maybe for your client's protection as well. Maybe he is entitled to setoffs for the care and feeding of these horses. I can't tell. You may proceed.

By Mr. McGavran:

Q. Do you know whether or not "Kiss on the Whips" was sold?

A. I do not know. It may have been. Again, I don't know the exact status of each of these animals.

Q. How about "Hill Daisy", do you know whether or not "Hill Daisy" was sold?

Mr. Reisenfeld: Objection, I believe the witness has answered at least seven times.

The Court: Sustained.

By Mr. McGavran:

Q. Look at what is Exhibit B to the security agreement; do you have that?

A. Yes, I do.

Q. Is this the list of syndicates to which you referred in your testimony when you were questioned by Mr. Reisenfeld?

A. Yes, sir, it is.

Q. Do you know whether or not the syndicates have been transferred to the bank's name or the bank has been nominated?

A. I do not know whether or not we have been nominated. We were given a packet of papers on each of these stallions syndicates by Mr. Hacker, which he proposed were the ownership certificates and yes, we have the files that he had in our possession now.

Q. Is it your testimony that the bank is or is not able to sell interests in these syndicates with the documents in its possession?

A. It is our position that we are able to sell these stallions syndicates which we have.

Q. These have already been sold, sir?

A. No, they have not. None of them have been sold.

Q. Do you have in the courtroom a copy of the June agreement to which you've referred in your testimony?

A. A copy of the June, 1983 agreement?

Q. Yes, Mr. Schaefer.

A. Yes, we do. Mr. Reisenfeld has it.

Mr. McGavran: Thank you.

The Court: Mark it, please.

The Clerk: Defendant's Exhibit B.

Mr. McGavran: May I see it for a moment, please?

The Court: Of course.

Mr. McGavran: Thank you, Your Honor, I have no further questions.

The Court: Anything further of this witness?

Mr. Reisenfeld: Nothing further.

The Court: Thank you.

Mr. Reisenfeld: If it please the court, I have other witnesses, if the court needs additional testimony.

The Court: No, I'm satisfied that there is some evidence here of insecurity. I think this plaintiff is entitled to the appointment of a receiver and I'm perfectly satisfied, upon request of the defendant, to set this matter for a full dress hearing on terminating the receivership, but I suggest to counsel, once again, I have a choice of

ways I can be wrong. If I must choose, I'm going to choose a way I think will protect the parties, rather than potentially damage it.

Accordingly, the motion for the appointment of receiver will be granted. I propose to appoint Robert Eddington, attorney in Cincinnati.

Mr. Reisenfeld, it is my policy that when I appoint a receiver, I do not appoint someone suggested by either party. The receiver is answerable to me and not to the parties.

Mr. Reisenfeld: I have nothing to suggest to the court.

The Court: Mr. Eddington is in the courtroom. Is there any suggestion as to bond that should be imposed?

Mr. McGavran: I would suggest, Your Honor, I've heard the court's ruling and, with all respect, may I make one suggestion that goes to my point about bond? Again, I do not know what other credit agreements Mr. Hacker may be party to and I do not know what appointment of a receiver here may do to his business.

I simply can't tell the court. My suggestion would be if—as the court does find the preliminary relief as warranted, could a temporary restraining order or a preliminary injunction satisfy the court's concern?

The Court: No, no, we are dealing with collateral which is mobile, volatile, alive. No way. So far as I'm concerned, I want these collateral brought under control of the court. It may be for a limited time and I will be perfectly happy to hear from you, but a restraining

order at this point against a person who, incidentally, is not within this district and, apparently, the horses are not either, so far as I'm concerned is not sufficient. Do you have any suggestion regarding bond?

Mr. McGavran: Yes, Your Honor, I think a bond of at least two million five hundred thousand dollars is called for under the circumstances of this case, because the appointment of a receiver for the assets may have grave financial consequences to Mr. Hacker, and I believe that the bond should assure that if it's determined at a later date that the appointment should not have been made, Mr. Hacker can be justly compensated.

The Court: I don't see that Mr. Hacker can be damaged in the value of the horses. I don't quite follow that logic. Mr. Reisenfeld.

Mr. Reisenfeld: I would only suggest that the purpose of a bond is not to protect Mr. Hacker in the event that he's been harmed. That would certainly be the bank's responsibility, and the last I heard, they were not consulted. I would suggest to the court that a nominal bond would be in order so as not to put great pressure upon the receiver. I would suggest to the court that a fair bond of fifty to a hundred thousand dollars would be more than sufficient.

The Court: I'm inclined to agree with you, Mr. Reisenfeld. Obviously, the bank, if they have acted improperly and caused damage to Mr. Hacker, they are liable.

Mr. Reisenfeld: Yes, Your Honor, I understand that.

The Court: I'm going to set bond at one hundred thousand dollars. I will direct that momentarily, at least, the premium for that bond be advanced by the Fifth Third Bank. Anything further to come before the court in this matter?

Mr. Reisenfeld: Nothing further.

The Court: Mrs. Anderson.

(Court was adjourned at 4 p.m.)

APPENDIX D

CASE NO.
C-1-83-1547

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FIFTH THIRD BANK
38 Fountain Square Plaza
Cincinnati, Ohio 45202

Plaintiff,

vs.

STEPHEN J. HACKER
427 South New York Avenue
Winter Park, Florida 32789
and
SJH ENTERPRISES, INC.
427 South New York Avenue
Winter Park, Florida 32789

Defendants.

COMPLAINT

(FILED SEPTEMBER 21, 1983)

COUNT ONE

(1) Jurisdiction is based upon diversity of citizenship pursuant to 28 U.S.C. § 1332. The amount in controversy exceeds $10,000, exclusive of interest and costs.

(2) On or about February 28, 1983, Stephen J. Hacker executed a Promissory Note, payable to the order of Fifth Third Bank in the amount of $2,395,273.92. This Promissory Note was a renewal of an already existing loan to Stephen J. Hacker from Fifth Third Bank. A copy of the Note is attached hereto as Exhibit "A" and incorporated herein by reference.

(3) Defendant J. Hacker is in default on said Note. Notice has been given to Defendant of the default. Defendant has refused to pay the amount due.

(4) There is due and owing to Plaintiff $2,345,273.92 principal plus interest at the rate of 11½% per annum from August 1, 1983.

COUNT TWO

(5) Paragraphs one through four are incorporated herein as though fully rewritten.

(6) On or about April 13, 1979, in consideration of the loan given to Defendant Stephen J. Hacker by Fifth Third Bank, Defendant SJH Enterprises, Inc. executed an "Unlimited Payment Guaranty" whereby it agreed to guarantee the prompt payment of all monies due under the Note executed by Defendant Stephen J. Hacker to Plaintiff. Said Guaranty was absolute and unconditional. A copy of said Guaranty is attached hereto as Exhibit "B" and incorporated herein by reference.

(7) Defendant SJH Enterprises, Inc. is in breach of its Guaranty of payment to Plaintiff of the Note which was executed by Defendant Stephen J. Hacker to Plaintiff in that said Note is overdue and remains unpaid.

(8) Demand for payment has been made upon SJH Enterprises, Inc. and no payment has been received from SJH Enterprises, Inc.

(9) There is due and owing to Plaintiff by reason of said breach, $2,345,273.92 principal plus interest at the rate of 11½% per annum after August 1, 1983.

WHEREFORE, Plaintiff demands judgment in the amount of $2,345,273.92 plus interest at the rate of 11½%

per annum on Count One; $2,345,273.92 plus interest at the rate of 11½% per annum on Count Two, plus interest, costs, and all other relief to which Plaintiff is justly entitled.

Respectfully Submitted,

REISENFELD & ASSOCIATES
/S/ LOUISE M. ROSELLE
LOUISE M. ROSELLE
Attorney for Plaintiff
Auburn Barrister House
2355 Auburn Avenue
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381-6810

OF COUNSEL:

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(513) 381-6810

APPENDIX E

CASE NO. C-1-83-1547

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FIFTH THIRD BANK,

Plaintiff

vs.

STEPHEN J. HACKER and
SJH ENTERPRISES, INC.,

Defendants

MOTION FOR APPOINTMENT OF RECEIVER

(Filed September 21, 1983)

Now comes Plaintiff, by and through its counsel, and respectfully moves this Court for an order appointing a receiver to take control and custody of Defendant Stephen J. Hacker's property, and in support of its Motion, alleges the following:

(1) Jurisdiction is based upon diversity of citizenship pursuant to 28 U.S.C. §1332. Amount in controversy exceeds $10,000, exclusive of interest and costs.

(2) On or about February 28, 1983, Defendant Stephen J. Hacker executed a Promissory Note payable to the order of Plaintiff in the amount of $2,395,273.92. This Promissory Note was a renewal of an already existing loan to Stephen J. Hacker from Fifth Third Bank.

(3) As collateral for the loan, Defendant Stephen J. Hacker gave Plaintiff a security interest in certain thor-

oughbred horses and undivided fractional ownership shares in certain horse syndicates.

(4) Stephen J. Hacker is in default of payment of the Promissory Note. Notice has been given to Defendant Stephen J. Hacker of the default.

(5) Plaintiff has ascertained that Defendant Stephen J. Hacker is insolvent or nearly insolvent, without sufficient assets to meet the demand of Plaintiff.

(6) Plaintiff has reasonable cause to believe that Defendant Stephen J. Hacker has transferred or will transfer the collateral to third parties in an attempt to defeat Plaintiff's security rights therein.

(7) Plaintiff's rights and interests, as set forth in the Affidavit attached, will be irreparably injured unless a receiver is appointed to take possession and control of the property. A Complaint is being filed by Plaintiff against Defendant in this Court.

(8) Plaintiff is a creditor and has a security interest in the property for which receivership is sought. A copy of the Financing Statement and Security Agreement is attached to the Affidavit attached hereto.

(9) Plaintiff has no adequate remedy at law. The injunctive remedy available in this Court would be inadequate and ineffective.

(10) Plaintiff has tried to work with Stephen J. Hacker towards an orderly liquidation of the collateral, but Defendant Stephen J. Hacker has not cooperated with Plaintiff.

(11) The collateral is located in several states in the United States and is held by third parties. State Court actions would be ineffective in this case.

(12) This Motion is based on Plaintiff's Complaint, a copy of which is attached hereto as Exhibit "A" and on the Affidavit of a representative of Fifth Third Bank, attached hereto.

REISENFELD & ASSOCIATES

/S/ LOUISE M. ROSELLE
LOUISE M. ROSELLE
Attorney for Plaintiff
Auburn Barrister House
2355 Auburn Avenue
Cincinnati, Ohio 45219
(513) 381-6810

CASE NO. _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FIFTH THIRD BANK

Plaintiff

vs.

STEPHEN J. HACKER and
SJH ENTERPRISES, INC.

Defendants

AFFIDAVIT

GEORGE A. SCHAEFER, JR., being first duly cautioned and sworn, deposes and states the following:

(1) That he is a Senior Vice President of Fifth Third Bank, Plaintiff, in this action, and this Affidavit is filed in support of its Motion for Appointment of a Receiver for the property described in said Motion;

(2) That, to the best of Plaintiff's knowledge, the property is in possession of Defendant Stephen J. Hacker or Defendant has access to the subject property;

(3) That Plaintiff has an interest and a right to said property by virtue of a Promissory Note executed by Stephen J. Hacker on or about February 28, 1983; and a Security Agreement executed by Stephen J. Hacker on or about November 1, 1982.

(4) That true and correct copies of the Promissory Note, the Security Agreement, and the Financing Statement are attached hereto and incorporated herein by reference.

(5) That Plaintiff believes it is necessary for the protection of its rights that a receiver be appointed for said property for the reason that Plaintiff has not received the Certificate of Registration for many of the horses from Stephen J. Hacker, despite repeated demands; that Plaintiff believes it has the authority to convey good title, but it is concerned that a prospective buyer might question that; and that Plaintiff has reasonable cause to believe that Defendant Stephen J. Hacker has transferred or will transfer the property to a third party in an attempt to defeat Plaintiff's rights therein and that Plaintiff will be irreparably harmed therefrom;

(6) That Plaintiff has tried to work with Stephen J. Hacker towards an orderly liquidation of the collateral,

but Defendant Stephen J. Hacker has not cooperated with Plaintiff;

(7) That the value of the property for which a receiver is sought is in excess of $500,000.00;

(8) That no previous application for a receiver has been made by Plaintiff.

Further Affiant Sayeth Naught.

GEORGE A. SCHAEFER, JR.

Sworn to before me and subscribed in my presence this — day of September, 1983.

NOTARY PUBLIC

APPENDIX F

Civil Action No. C-1-83-1547

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FIFTH THIRD BANK,

Plaintiff,

vs.

STEPHEN J. HACKER, *et al.*,

Defendants.

Judge Rubin

MOTION OF DEFENDANTS TO SET ASIDE RECEIVERSHIP AND FOR EVIDENTIARY HEARING

(Filed January 10, 1984)

Defendants Stephen J. Hacker ("Hacker") and SJH Enterprises, Inc. ("SJH") move the Court to vacate the Order Appointing Receiver entered September 23, 1983, on the grounds said Order was entered with inadequate notice and without opportunity for Hacker to present evidence on Defendants' behalf and on the grounds that a Receiver should not be appointed herein. In accordance with Local Rule 4.0.4, Local Rules for the United States District Court, Southern District of Ohio, Defendants move the Court for an evidentiary hearing on this Motion.

/s/ Frederick J. McGavran
Frederick J. McGavran
Trial Attorney for Defendants
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OF COUNSEL:

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(Certificate of Service Omitted in Printing)

APPENDIX G

Ohio Revised Code §2715.01. Grounds of attachment.

(A) An attachment against the property, other than personal earnings, of a defendant may be had in a civil action for the recovery of money, at or after its commencement, upon any one of the following grounds:

(1) Excepting foreign corporations which by compliance with the law therefore (therefor) are exempted from attachment as such, that the defendant or one of several defendants is a foreign corporation;

(2) That the defendant is not a resident of this state;

(3) That the defendant has absconded with the intent to defraud his creditors;

(4) That the defendant has left the county of his residence to avoid the service of a summons;

(5) That the defendant so conceals himself that a summons cannot be served upon him;

(6) That the defendant is about to remove his property, in whole or part, out of the jurisdiction of the court, with the intent to defraud his creditors;

(7) That the defendant is about to convert his property, in whole or part, into money, for the purpose of placing it beyond the reach of his creditors;

(8) That the defendant has property or rights in action, which he conceals;

(9) That the defendant has assigned, removed, disposed of, or is about to dispose of, his property, whole or in part, with the intent to defraud his creditors;

(10) That the defendant has fraudulently or criminally contracted the debt, or incurred the obligations for which suit is about to be or has been brought;

(11) That the claim is for work or labor;

(12) That the defendant has not complied with the provisions of sections 1306.01 to 1306.09 of the Revised Code, relating to bulk transfers.

(B) An attachment should not be granted on the ground that the defendant is a foreign corporation or not a resident of this state for any claim, other than a debt or demand arising upon contract, judgment, or decree, or for causing damage to property or death or personal injury by negligent or wrongful act.

(C) An attachment against the personal earnings of a defendant, through an action in garnishment of personal earnings, may be granted only after a judgment has been obtained by the plaintiff and only in accordance with Chapter 2716 of the Revised Code.

(D) An attachment against the property, other than personal earnings, of a defendant may be accomplished prior to the entry of judgment only pursuant to an attachment proceeding under this chapter.

An attachment against the property, other than personal earnings, of a defendant that is in the possession of another person, may be accomplished prior to the entry of judgment only pursuant to a garnishment proceeding

under section 2715.091 [2715.09.1] of the Revised Code and related provisions of this chapter.

(E) An attachment against the property, other than personal earnings, of a defendant that is in the possession of another person, may be accomplished after judgment has been obtained only pursuant to a garnishment proceeding under Chapter 2716 of the Revised Code.

Ohio Revised Code §2735.01. Appointment of receiver.

A receiver may be appointed by the supreme court or a judge thereof, the court of appeals or a judge thereof in his district, the court of common pleas or a judge thereof in his county, or the probate court, in causes pending in such courts respectively, in the following cases:

(A) In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject property or a fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff or of a party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and when it is shown that the property or fund is in danger of being lost, removed, or materially injured;

(B) In an action by a mortgagee, for the foreclosure of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt;

(C) After judgment, to carry the judgment into effect;

(D) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the property in satisfaction of the judgment;

(E) When a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

(F) In all other cases in which receivers have been appointed by the usages of equity.

END OF DOCKET